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In the Supreme Court of the United States

OCTOBER TERM, 1978

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

ALBERT EDWARD CLINES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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v.

ALBERT EDWARD GLINES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense and the other federal defendants,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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[1] The other defendants are the Secretary of the Air Force and two Air Force officers responsible for implementing the challenged regulations at the time of respondent's military service.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-16a) is not yet reported. The opinion of the district court (App. B, *infra*, 17a-27a) is reported at 401 F. Supp. 127.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Air Force regulations that require military personnel to obtain approval before circulating petitions to members of Congress on Air Force bases are invalid under 10 U.S.C. 1034.

2. Whether Air Force regulations that require military personnel to obtain approval before circulating petitions on base violate the First Amendment.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 10 U.S.C. 1034 provides:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

3. Air Force Regulation (AFR) 30-1(9) provides in pertinent part:

> Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander.

4. AFR 35-15(3)(a) provides:

> (1) No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander or his designee. A copy of the material with a proposed plan or method of distribution or posting will be submitted when permission is requested. Distribution of publications and other materials through the United States mail or through official outlets, such as military libraries and exchanges, may not be prohibited under this regulation.
>
> (2) When prior approval for distribution or posting is required, the commander will deter-

mine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances.

(3) Mere possession of materials unauthorized for distribution or posting may not be prohibited unless otherwise unlawful. However, such material may be impounded if a member of the Armed Forces distributes or posts or attempts to distribute or post such material within the installation. Impounded materials will be returned to the owner when departing the installation unless determined to be evidence of a crime.

(4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials.

(5) In general, installation commanders should encourage and promote the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues.

STATEMENT

1. Air Force regulations provide that "the public solicitation or collection of signatures on a petition by any person within an Air Force facility * * * is prohibited unless first authorized by the commander," and that "[n]o member of the Air Force will distribute or post any printed or written material * * * without permission of the commander or his designee * * *." AFR 30-1(9), 35-15(3)(a)(1). Distribution of such material is prohibited if the commander determines that "a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result." AFR 35-15(3)(a)(2). The regulations provide that "[d]istribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials." AFR 35-15(3)(a)(4).

In 1974, while respondent was on active duty as a captain in the Air Force Reserves, he drafted petitions to the Secretary of Defense and to several members of Congress opposing military hair length standards. Respondent was informed by his superiors at Travis Air Force Base that the on-base circulation of petitions was permitted only with the approval of the base commander. Respondent then circulated the petition off-base.

In April 1974, while respondent was at Anderson Air Force Base in Guam, he gave the petitions to an Air Force sergeant, who gathered eight signatures on the petitions. Because of the unauthorized circulation of the petitions, respondent was removed from active duty status and was charged with failure to meet the professional standards of a reserve officer. He declined to submit evidence on his behalf. The charges were sustained, and respondent was reassigned from the active reserve to the standby re-

serve. Respondent then filed this action seeking reinstatement and back pay, alleging that the prior approval regulations violated 10 U.S.C. 1034 and the First Amendment.

2. The district court granted respondent's motion for summary judgment.[2] The Court held that the regulations, "[o]n their face, * * * suffer from considerable overbreadth" (App. B, *infra*, 24a), and "impose[] a considerable burden upon the free exercise of the First Amendment right of petition for redress of grievances" (*id.* at 25a). Finding that "the military need to control petitioning arises only in extraordinary circumstances (such as in a combat zone * * * or in an induction center * * *)," the court concluded that the regulations violate the First Amendment (*id.* at 26a). The court entered a judgment declaring the prior approval requirement of the regulations to be unconstitutional, enjoining the Air Force from enforcing the regulations against

[2] The district court did not determine whether respondent had exhausted his administrative remedy before the Air Force Board for the Correction of Military Records. The court of appeals held, however, that the Board was an inappropriate forum for the resolution of "the essentially legal issues involved in this case" because it is "a clemency-oriented body" without authority to declare military regulations invalid (App. A, *infra*, 5a). Although we believe that the decision of the court of appeals on this issue was in error, see, *e.g.*, *Knehans* v. *Alexander*, 566 F.2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978); *Seepe* v. *Department of the Navy*, 518 F.2d 760 (6th Cir. 1975); *Horn* v. *Schlesinger*, 514 F.2d 549 (8th Cir. 1975), we now waive the exhaustion requirement and do not raise it in this petition.

respondent, and ordering the respondent's reinstatement to active duty with $22,032.91 in back pay.

3. *a.* The court of appeals affirmed in part and vacated and remanded in part. Relying on its decision in *Allen* v. *Monger*, 583 F.2d 438 (9th Cir. 1978), and on *Huff* v. *Secretary of the Navy*, 575 F.2d 907 (D.C. Cir. 1978), petition for cert. pending, No. 78-599, the court held that Section 1034 prohibits the application of the prior approval requirement to the distribution of petitions to members of Congress at the Guam air force base (App. A, *infra*, 7a-9a).[3]

b. 10 U.S.C. 1034 concerns only petitions to members of Congress, and one of respondent's petitions was addressed to the Secretary of Defense. The court of appeals therefore reached the question whether the prior approval requirement of the regulations is constitutional (App. A, *infra*, 9a). The court stated that the requirement is "obviously a prior restraint on speech, and prior restraints have the heaviest burden of justification under the First Amendment" (*id.* at 11a). The court concluded that there is no sufficient justification for the challenged regulations.

Although it recognized the special disciplinary needs of the military, the court held that the military interests could be satisfied through alternative means, such as "[p]unishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty periods, and

[3] We are filing a petition for a writ of certiorari in *Allen* concurrently with this petition. We have furnished copies of the petitions in *Allen* and *Huff* to counsel for respondent.

protection from pressure by superiors who are seeking signatures" (*id.* at 11a-12a). While the court stated that the regulations may be constitutionally valid in a combat-zone setting, the court concluded that the regulations were wholly unconstitutional because of their overbroad application to protected activity (*id.* at 13a).[4]

Despite holding the regulations unconstitutional, the court of appeals observed that monetary claims against the government for amounts in excess of $10,000 are within the exclusive jurisdiction of the Court of Claims and therefore vacated the award of back pay (*id.* at 14a-16a). The court remanded the case to the district court with instructions to dismiss the claim for back pay without prejudice or to transfer it to the Court of Claims (*id.* at 16a).

REASONS FOR GRANTING THE PETITION

1. The question of the validity of the challenged regulation under 10 U.S.C. 1034, as applied to petitions to members of Congress, is pending before this Court in *Secretary of the Navy* v. *Huff*, petition for cert. pending, No. 78-599, and *Brown* v. *Allen*, in which a petition is being filed concurrently with the present petition. We therefore believe that the disposition of this aspect of the petition may be deferred pending the Court's disposition of *Huff*.

[4] The court of appeals distinguished *Greer* v. *Spock*, 424 U.S. 828 (1976), which upheld the constitutionality of prior approval regulations at Fort Dix, on the ground that *Greer* involved civilian activity on the base, while this case concerns military personnel (App. A, *infra*, at 12a-13a).

2. If the Court were to grant our petition in *Huff* and determine that the challenged regulations do not violate 10 U.S.C. 1034, it could then resolve the question whether the regulations are consistent with the First Amendment.[5] Our petition in *Huff* contends (Pet. 10-14) that the prior approval requirement of the military regulations is a constitutional means of ensuring the ability of the military to perform its essential mission. Because the Court may properly reach this issue in *Huff*, we believe that this aspect of the petition in this case may also be deferred pending the Court's disposition of our petition in *Huff*. If the Court should decide *Huff* without reaching the constitutional question, then it should grant review in the instant case.

CONCLUSION

The Court should defer disposition of the petition pending disposition of *Secretary of the Navy* v. *Huff*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

[5] A conclusion that the regulations are unconstitutional would be an alternative ground for supporting the judgment of the court of appeals in *Huff*. The constitutionality of the regulations is, of course, raised directly here.

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 76-1412

ALBERT EDWARD GLINES, APPELLEE

v.

JAMES L. WADE, Commander 349th Material Airlift Wing, MAJOR GENERAL GONGE, Commander 22nd Air Force, JOHN L. MCLUCAS, Secretary of the Air Force, JAMES SCHLESINGER, Secretary of Defense, APPELLEANTS

Oct. 5, 1978

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN and HUG, Circuit Judges, and PALMIERI,* District Judge.

GOODWIN, Circuit Judge:

The government appeals a judgment ordering reinstatement in the Air Force, back pay, and declaratory relief which struck down as unconstitutional certain Air Force regulations.

We affirm the nonmonetary parts of the judgment but vacate that portion awarding back pay as beyond the jurisdiction of the district court to grant.

Albert Glines was a Captain in the Air Force Reserves. While on active duty, he took training as a

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* The Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

navigator instructor. Air Force standards describing maximum hair length offended him. To show his opposition, he drafted essentially identical petitions to several members of Congress and to the Secretary of Defense.[1] He intended to seek signatures to the petitions at his home station, Travis Air Force Base. Captain Glines learned, however, that Air Force Regulation 30-1(9) prohibits "the public solicitation or collection of signatures on a petition by any person within an Air Force facility * * * unless first authorized by the commander" and that AFR 35-15(3)(a)(1) prohibits the distribution of "any printed or written material * * * within any Air Force installation without permission of the Commander or his

[1] The petitions were identical except for the names of the person to whom they were directed and of the others to whom petitions were also being sent. That to the Secretary of Defense read:

"Dear Secretary of Defense:

"We the undersigned, all American citizens serving in the Armed Services of our nation, request your assistance in changing the grooming standards of the United States Air Force.

"We feel that the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy.

"We are similarly petitioning Senator Cranston, Senator Tunney, Senator Jackson, and Congressman Moss in the hope that one of our elected or appointed officials will help correct this problem."

designee."[2] Because of these regulations, Captain Glines first circulated the petitions off base. Later he

[2] AFR 30-1(9) reads:

"9. *Right of Petition.* Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander."

AFR 35-15(3)(a) reads:

"3. *Specific Guidelines and Prohibited Activities:*

a. *Possession and Distribution of Written or Printed Materials:*

(1) No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander of his designee. A copy of the material with a proposed plan or method of distribution or posting will be submitted when permission is requested. Distribution of publications and other materials through the United States mail or through official outlets, such as military libraries and exchanges, may not be prohibited under this regulation.

(2) When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances.

(3) Mere possession of materials unauthorized for distribution or posting may not be prohibited unless otherwise unlawful. However, such material may be im-

decided to ignore the regulations and to circulate the petitions on base. He also shaved his head.

The record does not show whether Captain Glines actually circulated the petitions on the Travis reservation. In April 1974, during a stopover at Guam, he gave copies of the petitions to a Sergeant Wolf. Sergeant Wolf gained eight signatures on Guam before base authorities learned of his activities, stopped them, and helped the signatories learn "the error of their ways". The Air Force immediately removed Captain Glines from active duty and soon afterwards reassigned him to the standby reserves. As a "standby" he was unable to complete his navigator instructor instructor training and lost other benefits.

Captain Glines brought this action alleging that the regulation of petitions violated 10 U.S.C. § 1034 and the First Amendment. He sought reinstatement and back pay. The district court declared the regulations void for statutory and constitutional infirmities, ordered Captain Glines reinstated in the active re-

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pounded if a member of the Armed Forces distributes or posts or attempts to distribute or post such material within the installation. Impounded materials will be returned to the owner when departing the installation unless determined to be evidence of a crime.

(4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials.

(5) In general, installation commanders should encourage and promote the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues."

serve, and awarded him more than $22,000 in back pay. *Glines* v. *Wade*, 401 F.Supp. 127 (N.D.Cal. 1975). The government appeal challenges the judgment on a number of grounds.

1. *Exhaustion of Administrative Remedies*

The government first argues that the district court should have required Captain Glines to seek relief from the Air Force Board for the Correction of Military Records (AFBCMR) before bringing this action. This point is not well taken.

Captain Glines' claim depends on constitutional and statutory interpretations which are beyond the scope of the jurisdiction of the AFBCMR. While the government treats the case as simply a claim for reinstatement and back pay, Captain Glines also sought and received a declaratory judgment invalidating the challenged regulations. Without this judgment he would remain subject to the regulations after his restatement. "Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Downen* v. *Warner*, 481 F.2d 642, 643 (9th Cir. 1973).

The AFBCMR was never intended by Congress to resolve the essentially legal issues involved in this case. Like other BCMRs, it is a clemency-oriented body, with authority to "correct an error or remove an injustice," 10 U.S.C. § 1552(a), not to declare the law. The Board simply substitutes for private congressional bills its remedy for individual grievances.

Congress stopped accepting such private bills when it authorized the BCMRs. 2 U.S.C. § 190g. BMCRs are not necessarily legally trained. They get their legal advice from the Judge Advocate General's office. *See, e.g., Flute* v. *United States*, 535 F.2d 624, 627-28, 210 Ct.Cl. 34 (1976). The AFBCMR has no authority to declare the challenged regulations invalid. Even if it gave Captain Glines all the redress within its power, it would not be able to protect him from further attempts by the Air Force to enforce its regulations. Only a court can do so.[3]

We recently held that a district court may require exhaustion to a BCMR, in its discretion, after balancing the relevant factors. *Montgomery* v. *Rumsfeld*, 572 F.2d 250, 252-54 (9th Cir. 1978). The district court, of course, did not have the opportunity to do the balancing we suggested in *Montgomery*. However, the district court did not in this case require exhaustion, and, for the reasons indicated, we agree with the district court.[4]

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[3] *Schlesinger* v. *Councilman*, 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1974), which the government cites, involved a district court's authority to enjoin a court-martial allegedly acting in excess of its jurisdiction. A courtmartial is, of course, a legally oriented body, as are the military appeals courts. They are competent to decide their own jurisdiction, and they do not take their legal advice directly from the Judge Advocate General's office.

[4] This court recently outlined in substance the following test of reviewability in a case brought by an enlisted member of an armed branch who objected to his duty assignment:

(1) The plaintiff must allege the denial of a constitutional right and the exhaustion of his military remedies.

[Footnote continued on page 7a]

II. *Statutory Claim*

10 U.S.C. § 1034 prohibits restrictions on communications between members of the military and members of Congress unless the communication is unlawful or the restrictions are necessary to the national security.[5] In *Allen* v. *Monger*, —— F.2d —— (slip opin. p. 3239) (9th Cir. 1978), we struck down under § 1034 Naval regulations requiring prior approval for the circulation of petitions on a ship at port in the United States. We held that the Navy's system of prior restraints was not necessary to the national security in the factual situation described in the *Allen* case.

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[4] [Continued]

(2) If the plaintiff satisfies step (1), he must then show that judicial review is warranted upon a proper balancing of the following considerations:

(a) the nature and strength of his claim;

(b) the extent of his potential injury if review is denied;

(c) the degree of civilian interference with the military mission if the court grants review; and

(d) the extent to which the decision to be reviewed was based upon military expertise.

Schlanger v. *United States*, —— F.2d —— (9th Cir., Sept. 11, 1978).

In the case at bar, Glines satisfies all the tests set forth in *Schlanger, supra*, even though, as the factual situations in the two cases reveal, the cases have little but the military uniform in common.

[5] 10 U.S.C. § 1034 reads:

"No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

The District of Columbia Circuit has upheld similar restrictions when applied to an actal combat zone. *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327 (1975). On the other hand, the same court has struck down regulations inconsistent with § 1034 when they were applied to a combat-ready base in Japan. *Huff* v. *Secretary of Navy*, 188 U.S.App. D.C. ——, 575 F.2d 907 (1978). The base commander filed an affidavit emphasizing the combat-ready nature of the base, but the majority found his argument unpersuasive.

The record now before us does not indicate the precise nature of the base on Guam where Captain Glines handed Sergeant Wolf the petitions. The government has not shown that Guam was more sensitive or that petitioning on that base was inherently more disruptive than was true of the base involved in *Huff*. While prior restraints on petitioning may promote some military objectives, the government has not shown that such restraints are actually necessary to the national security outside of a combat zone.

Despite proper deference to the military's ability to judge the impact of unauthorized petitioning on discipline, we do not believe the government has shown that the bad effects of petitioning would endanger the national security in these circumstances.[6] This is a determination we must make independently, for

[6] Glines was disciplined for violating the regulations requiring prior approval. The Air Force does not contend that he did anything else that would have subjected him to discipline.

Congress in adopting § 1034 has consciously restricted military command discretion on this point.

Only if we determine that the petitions are a threat to national security can we uphold the military restriction. "[W]e do not think that the national security can be said to require that the objective of military discipline be pursued to the exclusion of all other interests. If this were the case, then § 1034 would be a nullity, for restrictions on petitioning activity, as on other types of speech, can always be said to decrease the possibility of lapses of military discipline." *Huff* v. *Secretary of the Navy*, 188 U.S. App.D.C. at ——, 575 F.2d at 914. Congress adopted § 1034 because it preferred free communication with military personnel to absolute discipline in the military; AFR 30-1(9) and 35-15(3)(a) improperly ignore the Congressional policy.[7]

III. *Constitutional Claims*

Read literally, § 1034 protects only the four petitions addressed to members of Congress. One petition, which was essentially identical to the others, was addressed to the Secretary of Defense. This petition requires us to decide whether the First Amendment also protects Glines' activities.

It is clear that these regulations would be unconstitutional on their face if they applied to the public

[7] This discussion assumes that military discipline and free speech are necessarily incompatible. There is a strong argument to the contrary. Donald N. Zillman, *Free Speech and Military Command*, 1977 Utah L.Rev. 423, 433-34.

at large. Prior restraints on speech face a heavy burden of justification, which they are seldom able to meet. *New York Times Co.* v. *United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *Near* v. *Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). First Amendment rights do not expire upon enlistment in a military arm, although the needs of the service may modify the extent of the application of these rights. "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." *Parker* v. *Levy*, 417 U.S. 733, 758-59, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), quoting, at 759, 94 S.Ct. at 2563, *United States* v. *Gray*, 20 U.S.C.M.A. 63 (1970). The issue in *Parker* v. *Levy* was whether various Articles of the Uniform Code of Military Justice were too vague to support a conviction for statements urging enlisted men to disobey orders. The Supreme Court held that they were not. There was no prior restraint involved.

The First Amendment protects this country's basic commitment to open and vigorous debate. We have assumed as a nation that free discussion will be likely to lead to the right decisions, that, as Justice Brandeis said, when falsehoods and fallacies abound, "the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). The First Amendment reflects a conscious choice to prefer citizen autonomy to conformity.

A requirement for precirculation clearance is obviously a prior restraint on speech, and prior restraints have the heaviest burden of justification under the First Amendment.

> ". . . [P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights * * *.
>
> "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least, for the time." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976).

The military need for obedience and discipline may justify certain restrictions on speech that would be impermissible in civilian life. As *Parker* v. *Levy*, *supra*, shows, speech that poses a genuine threat of undermining obedience to orders may subject the speaker to appropriate punishment.[8] If Glines' activities had violated regulations that focused on these considerations, the Air Force's response might be acceptable. Punishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty periods, and protection from pressure by superiors who are seeking signa-

[8] We do not believe that vocal disagreement with public policy by itself necessarily leads to disobedience to orders. "I think, and any society which truly believes in a First Amendment must assume, that soldiers like other citizens can disagree with governmental policy and yet still realize that they must follow the legal requisites of that policy, including military service, until the policy is changed by democratic means." *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 335, 511 F.2d 1327, 1337 (1975) (Bazelon, J., dissenting).

tures would adequately protect the government's interest.[9]

The Supreme Court insists on less restrictive alternatives to prior restraint when they are available, and it critically examines whether the restraint will have its intended effect. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 563-70, 96 S.Ct. 2791. Less restrictive alternatives are available.

We have emphasized that these regulations are prior restraints on speech. The government suggests that they are, instead, merely time, place, and manner restrictions. This is how the District of Columbia Circuit treated the same regulations as applied in a combat zone. *Carlson* v. *Schlesinger*, *supra*. A combat zone, of course, is only a small part of the total military deployment. Restrictions there do not necessarily support restrictions throughout all other military reservations. Indeed, to treat these regulations as time, place, and manner restrictions necessarily implies that there must be other places within the military jurisdiction where petitioning by military personnel is permitted. Assuming that we would agree with the majority in *Carlson*, therefore, we do not think *Carlson* compels us to give combat-zone status to the regulations when applied here.

The Supreme Court also treated similar restrictions applied to civilian political campaigning as time, place, and manner restrictions in *Greer* v. *Spock*, 424

[9] See the limitations the district court adopted, and we approved on appeal, *Allen* v. *Monger*, 404 F.Supp. 1081, 1090 (N.D.Cal. 1975), *aff'd supra*.

U.S. 828, 86 S.Ct. 1211, 47 L.Ed.2d 505 (1976). The question there was whether uninvited civilians could come on the base, where they had no clear right to be, for political purposes. That is quite a different question from that of direct restraints upon the exercise by military personnel of the right of free speech.

It may be argued that the challenged regulations cover activity, such as petitioning in a combat zone, on which the military may legitimately impose prior restraints. The regulations are nevertheless void because they are overbroad. Since they affect Glines' activities, he has standing to challenge their overbreadth. *Parker* v. *Levy*, 417 U.S. at 760-61, 94 S.Ct. 2547; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Overbreadth appears from a cursory reading. The regulations deal with protected expression and could cover virtually all controversial written material. The commanding officer makes the decisions, and his views are centered on his command, not on abstract First Amendment values. The regulations, indeed, allow him to prohibit distribution partly because "the material is critical of Government policies or officials." AFT 35-15(a)(4). Glines' case itself shows that commanding officers may be unsympathetic to even the most innocuous exercise of First Amendment rights. Finally, the restrictions exceed anything essential to the government's interests. *United States* v. *O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1967). The regulations are valid, if at all, only in the limited setting of a combat zone. Their over-

breadth is substantial.[10] *Broadrick* v. *Oklahoma*, 413 U.S. at 615-16, 93 S.Ct. 2908.

IV. *Jurisdiction to Award Damages*

For the reasons we have already given, we hold that the district court was correct in declaring the regulations void, enjoining their enforcement, and ordering Glines reinstated in a status that is consistent with his status before he was relieved from active duty. However, it lacked jurisdiction to award him back pay, and we must vacate that part of its judgment.

Under the Tucker Act, a district court has jurisdiction to award damages against the United States to a maximum of $10,000. All other monetary claims must go to the Court of Claims. 28 U.S.C. § 1343(a)(2). There is no such restriction on actions seeking nonmonetary relief or actions claiming that a government official acted in violation of the Constitution or of statutory authority. The reason is that in these situations Congress has either waived sovereign immunity or the doctrine does not apply. 5 U.S.C. § 702; *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-91, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *Hill* v. *United States*, 571 F.2d 1098, 1102 (9th Cir. 1978); 14 Wright, Miller, and Cooper, Federal Practice and Procedure § 3655 (Supp. 1977). These doctrines justify the district court's judgment except for its award of back pay. Since the Court of Claims is without jurisdiction to grant general declaratory or equitable relief, the district court had no reason to defer to it. 28 U.S.C. § 1491; *United States* v. *Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *United States* v. *King*, 395 U.S. 1, 3, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969).

[10] The majority in *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. at 331-332, 511 F.2d at 1333-34, also questioned the regulations' breadth but stopped short of a finding of overbreadth. Judge Bazelon, dissenting, viewed them as invalid, as applied, and overbroad. 167 U.S.App.D.C. at 333, 511 F.2d at 1335.

Congress has waived sovereign immunity when damages will be paid from the public treasury only if the claimant sues under the Tucker Act in the proper court. Glines did not plead Tucker Act jurisdiction, and in any event the district court awarded him an amount in excess of its Tucker Act authority. While a district court may give damages as an incident to a declaratory judgment, it may do so only if such relief would otherwise be within its jurisdiction. 28 U.S.C. §§ 2201, 2202; *United States* v. *King*, 395 U.S. at 3-4, 89 S.Ct. 1501.

Glines argues that sovereign immunity is inapplicable, and the district court therefore had jurisdiction under 28 U.S.C. § 1331, because he alleged that the regulations are unconstitutional and in violation of a statute. He cites *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*, in support of his position. However, he does not come within the *Larson* exception to sovereign immunity. The Supreme Court specifically noted in *Larson* that a suit would still fail as against the sovereign if relief would require affirmative action or the disposition of sover-

eign property. 337 U.S. at 691 n.11, 69 S.Ct. 1457. Glines' action is of this nature. His relief must come from the Court of Claims. The government, of course, could not relitigate in that forum any issues which have been decided against it here.

We affirm the judgment of the district court except for its award of back pay. We vacate that award and remand it to the district court with instructions either to dismiss the claim without prejudice to another action in the Court of Claims or to transfer that part of the case to the Court of Claims directly. *Sherar* v. *Harless*, 561 F.2d 791, 794 (9th Cir. 1977).

Affirmed in part: vacated and remanded in part.

APPENDIX B

UNITED STATES DISTRICT COURT
N. D. CALIFORNIA

No. C-74-1264 WHO

ALBERT EDWARD GLINES, CAPTAIN USAF RESERVES, PLAINTIFF

v.

JAMES L. WADE, COMMANDER 349TH MATERIAL AIRLIFT WING, ET AL., DEFENDANTS

May 30, 1975

David M. Cobin, Breecker, Cobin & Dayley, Oakland, Cal., for plaintiff.

James L. Browning, Jr., U.S. Atty., Stephen A. Schefler, Asst. U.S. Atty., San Francisco, Cal., for defendants.

MEMORANDUM OPINION AND ORDER

ORRICK, District Judge.

This case concerns the constitutionality of certain Air Force regulations which limit the right of Air Force members to circulate petitions. The cause came on for hearing on cross-motions for summary judgment on May 13, 1975. Having considered the pleadings, the affidavits, the memoranda of points and authorities, and oral argument, for the reasons here-

inafter stated, plaintiff's motion for summary judgment is granted, and defendants' motion for summary judgment is denied.

I.

The material facts are undisputed. Stated briefly, plaintiff, a captain in the Air Force Reserves, was on active duty at Travis Air Force Base in April, 1974. He prepared a petition addressed to certain members of Congress requesting assistance in obtaining a relaxation of Air Force rules on hair length and, while on a routine training flight to Anderson Air Force Base in Guam, he allowed a blank copy of the petition to fall into the hands of another serviceman. This was in violation of Air Force Regulations AFR 30-1(9) and AFR 35-15, which state as follows:

> AFR 30-1(9):
>
> "*Right of Petition.* Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander.
>
> Reference: AFR 35-15"
>
> AFR 35-15:
>
> "* * *
>
> 3.a. *Possession and Distribution of Written or Printed Materials:*
>
> * * * *

> (2) When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances.
>
> * * * *
>
> (4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials."

Defendants, plaintiff's superiors, determined that for violating such regulations by failing to ask permission of the commander before circulating his petition, plaintiff was to be removed from active duty and reassigned to Standby Reserve. Plaintiff was so transferred effective July 10, 1974; in consequence, he lost and continues to lose salary, retirement benefits, and flight experience.

II.

The sole question of law presented on these facts is whether the Air Force Regulations thus restricting the right of petition on Air Force bases violate the First Amendment to the Constitution of the United States. If so, it was unlawful to discipline plaintiff for the above-described violation of said Regulations (*Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969)), and he is, therefore, entitled to reinstatement and compensation for the losses suffered by virtue of such discipline.

Military regulations have traditionally been subject to a somewhat different constitutional standard than that applying to laws regulating civilians. The applicable standard involves a balancing of individual liberties against the public interest in accommodating legitimate military needs. *Carlson* v. *Schlesinger*, 511 F.2d 1327, 1332 (D.C. Cir. 1975); *Callison* v. *United States*, 413 F.2d 133, 136 (9th Cir. 1969). Civilian standards as to First Amendment freedoms are to apply unless it appears that "conditions peculiar to military life require a different rule". *Kauffman* v. *Secretary of the Air Force*, 135 U.S. App.D.C. 1, 415 F.2d 991, 997 (1969), *cert. den.* 396 U.S. 1013, 90 S.Ct. 572, 24 L.Ed.2d 505 (1970). However, with respect to petitions to Congress, any restrictive regulation must actually be necessary to the security of the United States.[1]

There is, moreover, a general recognition by the judiciary that the military system of command requires that considerable latitude be given the Armed

[1] 10 U.S.C. § 1034 provides:

> "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

It appears clear that under this statute, as well as under the First Amendment itself, the right to petition Congress encompasses the right to solicit the signatures of others on petitions. Plaintiff has cited numerous cases to that effect, and this Court is not aware of any to the contrary. In *Carlson* v. *Schlesinger, supra*, at 1341 n. 21 (dissenting opinion), Chief Judge Bazelon advances the same view, and the majority opinion in that case does not seriously dispute it (*Id.* at 1333).

Forces in regulating and disciplining military personnel. *Parker* v. *Levy*, 417 U.S. 733, 758-759, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). This is based in part on the view that military officials are better qualified than judges to assess military needs and weigh the negative impacts on military effectiveness of certain types of speech or conduct.[2] While this concept necessarily limits the scope of review by the Court, it does not destroy jurisdiction altogether. In a case involving the very same regulations which are at issue here, the Court of Appeals for the District of Columbia recently stated that the latitude to be permitted in prescribing regulations varies with the magnitude of the governmental or military interest involved. *Carlson* v. *Schlesinger, supra*, at 1332. That being so, the Court must make a threshold determination as to the military interest at stake before proceeding to apply the balancing test articulated above.

In the *Carlson* case, it was held that in a combat zone setting (Vietnam), the military interest was manifest; therefore, a prior approval requirement for petitioning activities was reasonable, and the latitude to be afforded a commanding officer in applying the regulation was substantial. Under such circumstances, the *Carlson* court concluded it should not up-

[2] *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94, 73 S.Ct. 534, 97 L.Ed. 842 (1953); *Carlson* v. *Schlesinger, supra*, at 1333; *Dash* v. *Commanding General*, 307 F.Supp. 849, 853 (D.S.C. 1969), *aff'd* 429 F.2d 427 (4th Cir. 1970), *cert. den.* 401 U.S. 981, 91 S.Ct. 1192, 28 L.Ed.2d 333 (1971). See also, Chief Justice Earl Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181, 187 (1962).

set the military ruling "unless the military infringement upon first amendment rights [was] manifestly unrelated to legitimate military interests". *Id.* at 1333. The court, therefore, did not reach the question of the facial constitutionality of the regulations. *Id.* at 1334.

In the case at bench, the proscribed activity did not take place in a combat zone or during a time of war. It occurred at Guam in 1974. The military need to restrict peaceful petitioning activities appears, therefore, relatively insubstantial, and the Court may weigh the reasonability of the regulations with impunity.

AFR 30-1(9) requires prior approval by the commanding officer of *any* on-base solicitation of petition signatures at any time, as well as any off-base solicitation while in uniform or when in a foreign country. No distinction is made between combat and non-combat circumstances. No distinction is made between potentially inflammatory subjects and non-controversial material. No distinction is made between solicitation tending to interrupt or interfere with on-going military duties and solicitation at other times. The requirement applies to a broad range of petitioning activities which would unquestionably be protected in all but the most extreme military emergencies.

AFR 35-15 purports to provide guiding standards for commanders enforcing AFR 30-1(9). Consequently, it must be scrutinized together with AFR 30-1(9)

in order to determine the constitutionality of both, because:

> "* * * a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth* v. *Birmingham*, *supra*, at 150.

AFR 35-15 creates no categories of petitions or circumstances to be exempted from the prior authorization requirement. The commander is clearly to pass upon *all* petitions to be circulated. The guidelines permit the commander to prohibit petition circulation upon a determination that it presents a "clear danger "to loyalty, discipline or morale' or that it materially interferes with "accomplishment of a military mission".[3] These guidelines are, therefore, substantially broader than those prescribed by Congress in 10 U.S.C. §1034, which permits only such regulation as is "necessary to the security of the United States". Arguably, under *Parker* v. *Levy*, *supra*, the limiting construction given the terms "loyalty, discipline and morale" by long military usage and interpretation might narrow the scope of AFR 35-15. But, as pointed

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[3] Moreover, the *caveat* in AFR 35-15 that signature gathering "may not be prohibited *solely* on the ground that the material is critical of government policies or officials" (emphasis added) implies that the critical nature of the material may properly be at least a secondary ground for denying permission.

out in the dissenting opinion in *Carlson* v. *Schlesinger*, *supra*, at 1342-1343, guidelines regulating *conduct* which are narrow enough to pass constitutional muster may not be sufficiently narrow when they regulate protected *speech* instead.[4] Furthermore, even narrowly construed, the terms are far broader than the outer limits on restriction set by Congress.

On their face, therefore, the regulations suffer from considerable overbreadth.[5] A law is overbroad "if in its reach it prohibits constitutionally protected conduct." *Grayned* v. *City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). Even without actual prohibition, the chilling effect which inheres in overly broad restrictions in general[6] is particularly apparent in a military setting, where petitions addressed to members of Congress are very likely to involve complaints about military policies or about the administration of military affairs by su-

---

[4] The Supreme Court in *Parker* v. *Levy*, *supra*, at 756, 94 S.Ct. 2547, also notes this rule, citing *Smith* v. *Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974).

[5] They may also suffer from vagueness, but vagueness is not an issue here since plaintiff has no standing to raise it. Since AFR 30-1(9) requires prior permission for circulating *any* petition, plaintiff could have had no doubt of its applicability to him. See *Parker* v. *Levy*, *supra*, at 756, 94 S.Ct. 2547.

[6] *Steffel* v. *Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Grayned* v. *City of Rockford*, *supra*, at 114, 94 S.Ct. 2294; *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-487, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *NAACP* v. *Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

perior officers.[7] To require that all petitions to be circulated be passed upon first by the base commander imposes a considerable burden upon the free exercise of the First Amendment right of petition for redress of grievances.

Balanced against that burden is the legitimate need of the military to restrict the circulation of certain petitions under certain circumstances. Those circumstances are spelled out by Congress in 10 U.S.C. § 1034,[8] and it would be improper for this Court to imply the existence of any others.[9] It is not seriously disputed that a petition like plaintiff's, involving a subject as innocuous as Air Force grooming standards and circulated without fanfare, falls far outside those legitimate areas of military concern. It must, of course, be recognized that the Supreme Court has indicated First Amendment restrictions should not be declared unconstitutional for overbreadth where they could validly be applied to numerous situations and invalidly to only "marginal" situations. *Parker* v. *Levy*, *supra*, at 760. But that is not the case here.

---

[7] Such was the case here, as well as in *Carlson* v. *Schlesinger*, *supra*, *Callison* v. *United States*, *supra*, and *Allen* v. *Monger*, C-73-745RFP and *Moses* v. *Foley*, C-73-1012RFP (N.D.Cal. Aug. 23, 1974) decided by Judge Peckham of this Court.

[8] See, *supra*, Note 1.

[9] As the Court of Military Appeals stated in *United States* v. *Schmidt*, 16 USCMA 57, 59 (1966):

> "[T]he purpose behind this legislation is obvious and the right absolute within the strictures specifically delineated therein."

On the contrary, the military need to control petitioning arises only in extraordinary circumstances (such as in a combat zone as in *Carlson* v. *Schlesinger, supra*, or in an induction center where disruption is threatened as in *Callison* v. *United States, supra*), and thus it is the exception rather than the rule. Clearly such governmental interests are inadequate to outweigh the burden on personal liberty imposed by the regulations, especially where the regulations could be rewritten so as to apply only in those situations where they might be reasonably necessary.[10]

Consequently, I must conclude that the regulations, AFR 30-1(9) and the petinent parts of AFR 35-15, taken together, failed to meet the test of constitutionality under the First Amendment and the applicable case law. They are, therefore, invalid, and plaintiff was improperly disciplined for having breached them. Plaintiff is entitled to restoration of all benefits and privileges to which he was entitled prior to his removal from active duty status on April 17, 1974, including future active duty, compensation for wages lost as a result of said removal, and injunctive relief against all punitive actions taken or threatened by defendants by reason of the petitioning activities which are the subject of this lawsuit. Accordingly,

It is hereby ordered that plaintiff's motion for summary judgment is granted.

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[10] Chief Judge Bazelon suggests a format for alternative regulations in *Carlson* v. *Schlesinger, supra*, at 1344-1345 (dissenting opinion). This Court notes also that it is a much simpler matter for an administrative office to redraft its own regulations than for a legislature to revise its statutes.

It is further ordered that defendants' motion for summary judgment is denied.

Counsel for plaintiff shall prepare and file a judgment in accordance with this memorandum opinion and order in form approved by defendants on or before June 13, 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 270677 233

Supreme Court, U. S.
FILED
JUN 1 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1006

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,
Petitioners

—*v.*—

CAPT. ALBERT EDWARD GLINES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 20, 1978
CERTIORARI GRANTED MARCH 19, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1006

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,
Petitioners

—*v.*—

CAPT. ALBERT EDWARD GLINES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1974	
June 14	Filed Complaint; issued summs Filed ord for proc serv by Miles Frieden
June 19	Filed pltf's mo for TRO & Ord fixing time for hrg mo for pre-injn
June 20	ORD: pltf's mo for TRO—DENIED —SAW
Aug 2	Filed summs on ret: unexec.
Aug 19	Filed Defts' Not of Mot and Mot to Dismiss; supporting memo; and proposed ord, 9-12-74 @ 2:15 p.m.
Sep 5	Filed Stip & ORD for cont hg set for 8/19/74, mo to dism. cont. to 9/26/74, 9am. WHO
Sep 12	Filed Pltfs. Not of Mo & Mo for Leave to Amend Complt., Pts & Auth . . . Proposed Amended Complt . . . Prop. form of ord. 9/26/74, 9am
Sep 12	Filed ORDER for Service by Pat Campbell Clerk
Sep 17	Filed Marshal's Ret on Compl: EXE 9/13/74 by Reg. Mail
Sep 20	Filed Marshal's Ret. on S/C EXE to J. L. Wade 9/14/74 & to Maj. Genl. J. F. Gonge 9/13/74
Sep 23	Filed Defts. Suppl Memo in Support of Defts. Mo to Dism. C-74-1264 WHO
Sep 26	Filed Afft of Melvin K. Dayley Filed Afft of Patricia Lee Campbell
Sep 26	ORD: Pltfs. Mo to Amend Complt GRANTED . . . Defts. Mo to Dism. DENIED . . . Pre Disc conf to be held in 60 days. WHO
Oct 1	Issued Summons on Amended Complaint
Oct 1	Filed ORDER Granting Pltfs. Mo for Leave to Amend Complt & Denying Defts. Mo. to Dism.

DATE	PROCEEDINGS

1974

Oct 4 Filed *ANSWER TO AMENDED COMPLT.*

Oct 8 Filed Clerk's Not of Pre Disc Conf., 12/17/74, 9am

Dec 17 ORD: Pre Disc Conf., cont to 4/11/75, 9am for PT Conf., 4/21/75, 10am for Trial, Mo for Summ Judgt 2/26/75, 9am WHO

Dec 17 Filed Clerk's Not of PT Conf., 4/11/75, 9am

Dec 20 Filed Ret on Summs on Amended Complt. EXE to Maj. Gen. Rollin B. Moore on 12/17/74

1975

Feb 5 Filed Defts. Not. & Mo to Dism or in the Alternative to Stay Pending Fur Proceedings, Reasons & Auth, Prop form of Ords

Feb 14 Filed Pltfs. Memo in opp to Defts Mo to Dism or in the Alternative to Stay Pending fur Proceedings

Feb. 19 Filed Defts Reply Memo in supp of Mo to Dism, etc.

Feb 20 Filed Defts Suppl Reply Memo in Supp of Mo to Dism

Feb 25 Filed Stip & ORD Cont Hrg on Defts Mo to Dism 3/11/75, 9am —WHO

Mar 12 Filed pltf's 1st Interrogs to defts

Mar 11* ORD: Defts Mo to Dism DENIED, ord to be prepared by Deft WHO

Mar 14 Filed ORDER Denying Defts Mo to Dism or in the Alternative to Stay Pending Fur Proceedings

Mar 26 Filed Stip & ORDER Shortening Time for hrg 4/1/75, 9am WHO

Filed Defts Not. & Mo for Reconsideration of Ord Denying Dism or Remand/and in the Alt Reg for Cert. on Appeal, Memo 4/1/75, 9am

DATE	PROCEEDINGS

1975

Mar 27 Filed Pltfs. Memo of Law in Opp to Defts Mo for Reconsideration of Ord Denying Dism or remand & in the alt req for cert. on appeal

Apr 1 ORD: PT Date of 4/11/75 & Trial date of 4/21/75 VACATED, Mots for summ jdugt are to be filed hrg date 5/1/75, 9am WHO

Apr 8 Filed ord. re mo for reconsideration heard 4-1-75; etc.; hearings on mos. set for 5-1-75/9:00; dates for trial & P/T conf previously set are vacated. WHO

Apr 10 Filed deft's no & mo for sumry. judgmt or dismissal and remand, set for 5-1-75/9:00.

Apr 18 Filed deft's ans to pltf's first set of unterrogs.

Apr 21 Filed pltf's no and cross mo for summary judgt.

Apr 24 Filed deft's memo in reply re mo for summary judgt/remand & in response to pltf's X-mo for summary judgt.

Apr 29 Filed stip & ordshortening time to 5-1-75/9:00 for hrg of pltf's mo to amend cmplt; obj. to be filed by 4-30-75/4:00. WHO
Filed pltf's no & mo for leave to amend cmplt set for set for 5/1/75/9:00.

Apr 30 Filed defts' memo regarding pltf's mo for leave to amend cmplt. ORD: mo for summary judgt cont'c to 5-13-75/9:00. WHO

May 8 Filed supplemental memo in support of deft's mo for summary judgt.

Filed pltf's memo of law on applicability of CARLSON vs. SCHLESINGER.

May 13 ORD: pltf's & deft's mos for summary judgt submitted. AJZ

DATE	PROCEEDINGS
1975	
May 16	Filed order granting leave to amend cmplt. WHO Filed second amend cmplt.
May 30	Filed memo of opinion and ord; pltf's mo for summary judgt is granted; deft's mo for summary judgt is denied; pltf to prepare and file judgt on or before 6-13-75. WHO
June 6	Filed deft's ans to 2nd amended cmplt.
June 9	Filed deft's ex parte mo for reconsideration and/or clarification of the memo opinion & order.
Jun 20	Filed deft's objections to proposed judgt. Lodged proposed summary judgt.
Jul 9	Filed pltf's reply to defts' objections to prosed judgt, and defts' ex parte mo for reconsideration and/or clarification of the memo opinion and order.
Jul 14	Filed letter from CAPT. CARL H FOSTER IN ANS to pltf's inquiry about the number of days active duty he would have performed as a member of the 301 Military Airlift Squadron during the calendar year 1974.
	ORD: hrg re form of judgt; ord proposed form judgt be amended; cont'd to 9-26-75/1:30 for evidentiary hrg re damages . . . WHO
Aug 1	Filed deft's interrogs to pltf.
Aug 18	Filed Pltff's Interrog to Deft's
Aug 25	Filed Deft's Memo in support of Deft's objections to Pltf's proposed judgment, as amended by the court
Sept 12	Filed pltf's ans to interrogs.
Sept 16	Filed pltf's memo of law in support of proposed judgt awarding back pay and benefits, and in oppsn to deft's memo.
Sept 19	Filed deft's answers to interrogs.

DATE	PROCEEDINGS
1975	
Sept 23	Filed deft's reply memo of prosed judgt in awarding back pay and benefits.
Sept 26	ORD: evidentiary hrg re damages; stip to be filed by 10-3-75 re pay rates; addl briefs & papers due by 10-3-75. WHO
Oct 3	Certificate of plaintiff's attorney concerning plaintiff's earnings.
	Plaintiff's memorandum of law construing MOORE v. SCHLESINGER 384 F. Supp. 163 (D. Colo. 1974)
Oct 15	Stipulation setting forth items to be used in determining amount of back pay due plaintiff if ordered by Court.
Dec 1	OPINION and ORDER: ordered that GLINES recover back pay; plaintiff to submit by 12-15-75 a certificate of counsel setting forth the sum of money due GLINES as back pay, etc. (WHO)
Dec 10	Civil subpoen executed—THOMAS WICK.
	Civil subpoena executed—RICHARD DAUM.
	Civil subpoena executed—CARL FOSTER.
Dec 19	Defendant's notice of motion and motion for stay pending appeal, 1-9-76/1:30.
1976	
Jan 5	Defendants' affidavit of STEPHEN SHEFLER
Jan 6	ORDER that hearing of defendant's motion for stay pending appeal is continued to 1-16-76/1:30. (WHO)
Jan 12	Plaintiff's memorandum of law in opposition to defendants motion for stay pending appeal.
Jan 13	Defendant's reply to plaintiff's memorandum in opposition,

DATE	PROCEEDINGS
1976	
Jan 16	MINUTE ORDER: defendant's motion to stay order pending appeal granted; defendant to prepare order. (WHO)
	Entered JUDGMENT. (WHO)
Jan 19	Defendant's Notice of Appeal.
Jan 21	ORDER staying Judgment pending appeal.
Jan 20	Stipulation setting forth back pay due plaintiff for 1974 and 1975.
Jan 23	Appellant's designation of record on appeal.
Jan 30	Appellee's designation of record on appeal. Appellee's order for reporter's transcript.
Feb 12	Plaintiff's bill of costs in amount of $163.20.
Feb 26	Reporter's transcript of 9-26-75, original and one copy.
Feb 27	MAILED RECORD ON APPEAL TO 9th CCA and COPIES TO COUNSEL OF RECORD.

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Oakland, California 94609
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Category: CIVIL RIGHTS

No. C-74-1264 SAW

ALBERT EDWARD GLINES, Captain USAF Reserves, PLAINTIFF

vs.

JAMES L. WADE, Commander 349th Material Airlift Wing; MAJOR GENERAL ROLLIN B. MOORE, JR., Commander Western Air Force Reserve Region; MAJOR GENERAL JOHN F. GONGE, Commander 22d Air Force; JOHN L. MCLUCAS, Secretary of the Air Force; JAMES SCHLESINGER, Secretary of Defense, DEFENDANTS

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, MANDAMUS, AND INJUNCTIVE RELIEF

For his complaint against the above-named defendants, plaintiff alleges:

JURISDICTION

* 1. This action arises under the First and Fifth Amendments to the United States Constitution; 10 U.S.C. 1034; and the rules, regulations, and directives of the Department of Defense and the United States Air Force.

---

* Indicates that an amendment appears within the paragraph.

This Court has jurisdiction under 28 U.S.C. §§ 1331, 1346, 1651, 2201, and 2202. The amount in controversy exceeds ten thousand dollars, exclusive of interest and costs. In so far as this action involves claims for monetary relief, such claims amount to less than ten thousand dollars. Venue is proper under 28 U.S.C. 1331(e). Each defendant is an officer or employee of the United States or an agency thereof acting in his official capacity or under color or legal authority. This action is brought in the judicial district in which (1) a defendant in the action resides, or (2) the claim arose.

PARTIES

2. At all times mentioned herein, plaintiff ALBERT E. GLINES was Captain, United States Air Force Reserve, assigned to the 301st Material Airlift Squadron of the 349th Material Airlift Wing, Travis Air Force Base, California.

* 3. Defendant Colonel JAMES L. WADE is the Commander, 349th Material Airlift Wing. Defendant Major General MOORE is Commander, Western Air Force Reserve Region. Defendant Major General GONGE is Commander, 22nd Air Force. Defendant JOHN L. MCLUCAS is Secretary of the Air Force. Defendant JAMES SCHLESINGER is Secretary of Defense. Each Defendant is sued in his official capacity.

FACTS

4. At all times mentioned herein, plaintiff ALBERT E. GLINES was a Captain, USAFR, assigned to the 301st MASq of the 349th Material Airlift Wing. Plaintiff has served many years as an aircraft navigator, and has a total of 9 years, 8 months, and 17 days active duty service. Although a reservist, plaintiff spent a total of 237 days of active duty in 1973, and was on active duty status during 1974 continuously through April 17, 1974. Captain GLINES has an outstanding record as a military officer, having received the Air Force Medal (Exhibit A) among other decorations. In an officer effectiveness report, his superior officers in July 1972 stated that "Captain Glines clearly is the most competent navigator within my flight, and probably the most competent within the entire group." (Exhibit B, Page B-2). On April 3, 1973, plaintiff was rated as an "energetic, zealous officer with a cooperative attitude. He is easy to get along with and gets along well with others. He has excellent potential and is a dedicated officer." (Exhibit C) In another effectiveness report dated October, 1973, the rater concluded that "Captain Glines has performed his duties in an exceptionally fine manner throughout the period of this report." (Exhibit D) His military fitness reports are all highly complimentary, and even a cursory examination of his record shows him to be an outstanding officer.

5. In January, 1974, defendant Colonel JAMES L. WADE assumed command of the 301st MAW. During his initial briefing of the men under his command, Colonel WADE stated that it was his intent to have an open door policy. In commenting on the hair cut policy of the wing, Colonel WADE stated that he did not believe that aircraft crews should fail qualification checks for long haircuts (as was the previous policy), but that offenders should be courts-martialed and tried by their peers. He stated that he personally did not like the Air Force hair cut regulation, and that at a previous duty assignment, he had allowed an airman's hair to grow longer than regulation and had submitted pictures of it to higher headquarters in an attempt to get the regulation changed to the longer style. He stated that his endeavor was unsuccessful. He further stated that while he would require compliance with the current Air Force regulation, he was not opposed to attempts to change the regulation by working within the system. He stated that "If someone were to bring a properly worded petition to me, I'd be the first to sign it."

6. In March of 1974, Defendant Colonel WADE further stated his beliefs concerning the Air Force hair regulation at a Junior Officers Council meeting at the Officers Club, Travis Air Force Base. To demonstrate his beliefs, he wore a long-hair wig to the meeting, and

addressed the meeting, in uniform, wearing the long-hair wig. He again stated his position that he would sign a properly worded petition seeking to change the hair cut regulation.

7. In February of 1974, plaintiff sought legal advice about the circulating of a petition concerning the hair cut regulation. Plaintiff talked at length to Captain Marks, a military lawyer, who was attached to the Judge Advocate General's office at Travis Air Force Base. Plaintiff showed Captain Marks a draft of the proposed petition (Exhibit E), and Captain Marks advised plaintiff that on the basis of A.F. Regulation 35-15, plaintiff could not circulate a petition on base without first securing the permission of the base commander or his wing commander. Captain Marks further advised plaintiff that the circulation of a petition was not proscribed off base even without first securing such permission. Plaintiff requested and was given a copy of A.F. Regulation 35-15.

8. Thereafter, plaintiff went to Defendant Colonel WADE and showed him the draft of the proposed petition. (Exhibit E) Colonel WADE read the draft, and then told plaintiff that he thought plaintiff was "making a mistake." Plaintiff reminded Colonel WADE of his previous statements that he himself was ready to sign a petition, to which Colonel WADE replied that the regular Air Force officers were just beginning to accept the reservists, and the circulating of this petition would undo his work. Colonel WADE stated that plaintiff was asking for trouble if he circulated the petition, but that it was up to plaintiff whether he wanted to circulate it. Colonel WADE did not advise plaintiff to refrain from circulating the petition, but stated that he personally did not agree with circulating it.

9. Plaintiff then decided that if he were to circulate a petition, it would be off base, and did not formally seek the approval of the base commander. Because he feared that his superior officers would retaliate for his circulating the petition (even off base) by citing him for improper hair length, plaintiff decided to minimize this possibility by shaving his head bald. At least one other

officer in plaintiff's unit customarily had shaved his head. Colonel WADE's reaction was to laugh and to use plaintiff in a light-hearted way as an example at his briefings as one officer whose hair cut came within regulations.

10. Plaintiff subsequently had the petition printed at a privately owned print shop off base, paying for the printing job himself. The petition (attached hereto as Exhibit F) consists of five pages stapled together, with separate pages constituting petitions addressed to Senator Cranston, Senator Tunney, Senator Jackson, Congressman Moss, and the Secretary of Defense.

11. The printing job was completed on April 9, 1974, and thereafter plaintiff began placing copies of the petition in various stores and private businesses located near Travis AFB, California.

12. One week later, plaintiff was assigned to a routine training flight to the far east, with stops in Guam and Japan. When the aircraft landed in Guam and plaintiff was still in the process of securing his navigational and personal gear on board the aircraft, a party of ground maintenance troups assigned to Anderson AFB, Guam boarded the aircraft. An unsigned copy of the aforementioned petition was among plaintiffs papers, and a member of the ground party asked to see it. The copy was unsigned and the ground crew member asked whether he could have the copy. Plaintiff replied that he could, but that he should not attempt to get signatures on it while on base. Plaintiff explained that the petition could not be circulated on base without the base commander's approval, and if he wanted to collect signatures on the petition, he should do so off base. Plaintiff gave the ground crew member a card with plaintiff's name and address on it, stating that if he had any questions, he should get in touch with plaintiff. Plaintiff had no further contact with the ground crew member, and having just completed a 20 hour work day, retired for the night.

13. The following morning, Colonel Harley S. Black, the commander of the MAC detachment at Anderson AFB, Guam, called petitioner's aircraft commander, and demanded to know about "the petition to the senators."

Plaintiff talked to Col. Black, informed him that he had brought in petitions on the training flight, but that plaintiff did not know how the petitions could have got around and would check.

14. Plaintiff ascertained that the only petition that had left his possession was the one given to the ground crew member the previous night. Plaintiff then called the base legal office to see whether he had violated any local regulations or whether his action was wrongful in any other way. Plaintiff talked to a JAG officer, Captain Petrowski, who advised plaintiff that he had not violated any regulation, and stated that he felt that Col. Black was overreacting to the incident because Col. Black had already called the legal office in an outrage.

15. Subsequently, on the second leg of the training flight in Japan, plaintiff was informed that he should contact 22d Air Force for instructions, by order of Major General GONGE, Commander of 22d Air Force. Instructions were given for plaintiff to report to his commander immediately upon landing at Travis AFB, California.

16. Plaintiff met with defendant Colonel WADE, commander of the 349th MAC Wing, upon landing. Colonel WADE informed plaintiff that Major General GONGE was ordering a complete investigation of the incident in Guam and had his chief legal advisers working on it, and that Major General GONGE had stated that plaintiff would never again be allowed to fly on a 22d Air Force aircraft. Colonel WADE then told his operations officer, Major William C. White, to order plaintiff off active duty, effective at midnight that day. Major White did so (Exhibit G), and plaintiff returned to his home.

17. On April 25, 1974, plaintiff engaged in a lengthy telephone conversation with Major William O. White, the wing operations officer. Major White informed plaintiff that he had been given until May 8, 1974 to resign from the unit, or paperwork would be processed through reserve headquarters to remove plaintiff from Active Reserve Status. Major White stated that unless plaintiff voluntarily resigned, he would probably lose his commission.

18. On April 26, 1974, plaintiff was advised by letter (Exhibit H) from defendant Colonel WADE that he was to be removed from his unit and transferred to the Standby reserve. This letter stated that plaintiff had until May 8, 1974 to submit any evidence bearing upon his case, and that on that date the entire case would be forwarded to reserve headquarters for finalization. The letter states that such action is taken in accordance with the provisions of Table 12-1, Rule 8, Air Force Manual 35-3 (attached hereto as Exhibit I).

19. On April 29, 1974, plaintiff was again advised by Major White to resign. Major White stated that plaintiff's case had already been decided, and that plaintiff would never be able to get into any reserve unit and would lose his commission if he did not resign.

* 20. Plaintiff then requested that he be given a copy of the evidence that was to be forwarded to reserve headquarters to justify his being taken off active duty status. Although initially denied access to and copies of such information, plaintiff was finally given the material attached hereto as Exhibit J. Plaintiff was shown a copy of a letter by a Colonel Hollingshead, which was part of the material which was to be forwarded, but was denied a copy. Plaintiff has, since that time, obtained a copy of Colonel Hollingshead, which letter is attached hereto as Exhibit J1. This material was forwarded to Defendant Major General ROLLIN B. MOORE, JR.; Commander, Western Air Force Reserve Section. Major General MOORE then forwarded this material to USAF Reserve Headquarters with his recommendation that Plaintiff be transferred to Standby reserve status under AFM 35-3. A copy of this letter is enclosed and marked Exhibit J2.

* 21. Following being removed from active duty by order of Colonel WADE on April 17, 1974, plaintiff continued to attend his unit's monthly weekend drills (Unit Training Activities), but was denied further active duty. Plaintiff had previously been scheduled to be on active duty continuously from January 1, 1974 through April 26, 1974, and thus was denied nine days of active

duty by reason of defendant Colonel WADE's action in removing him from active duty effective April 17, 1974. Plaintiff additionally had been authorized to attend a training seminar from May 6 to 17, 1974 (Exhibit K), and that authorization was also cancelled by reason of Colonel WADE's action in removing plaintiff from active duty. The training seminar would have lasted 13 days, with two additional days travel time, for a total of 15 days of active duty. Plaintiff thus has been denied a grand total of 24 days active duty for which plaintiff would have been paid $1,176.00 net pay and allowances.

(new) 21-A. On June 27, 1974 Major General Earl O. Anderson, Vice Commander Air Force Reserve, granted authority to reassign Plaintiff to Standby reserve in accordance with Rule 10, Table 8-1, Chapter 8, AFR 35-41. A copy of that authorization is enclosed as Exhibit K1.

(new) 21-B. On July 3, 1974 Plaintiff was informed of the above-mentioned authorization and, in accordance therewith, was transferred to the Standby reserve, effective July 10, 1974. A copy of that reassignment notice is enclosed as Exhibit K2.

* 22. Plaintiff has more than 13 years total service with the USAF (see Exhibit L). In order to qualify for any retirement benefits as a reservist, plaintiff must accumulate 20 years of service. If he remains on standby reserve status, he cannot accumulate further service time for purposes of retirement. Plaintiff is thus threatened with the loss of many years of work done with the expectation that retirement benefits were being accrued.

23. Plaintiff has been informed and believes that defendant Colonel WADE's purpose in attempting to transfer plaintiff to Standby Reserve status is to deprive plaintiff of his livelihood as a navigator and his status as an officer. Plaintiff is informed and believes that he will lose his commission as a further consequence of being transferred to the Standby Reserves.

BASIS FOR EQUITABLE RELIEF

* 24. Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for mandamus declaratory judgment and injunctive relief is his only means of securing adequate redress from the unlawful orders and other actions of defendants.

* 25. Unless the Court supplies the relief requested by plaintiff, he will suffer irreparable injury. If plaintiff remains Standby Reserve status, he will lose further active duty pay and allowances, will lose all right to retirement benefits built up over the course of many years service, and will lose his rating as a navigator.

* 26. No irreparable injury to the operation of the USAF would result if plaintiff is placed in Ready Reserve status pending the determination of this Court. He had been attending the regular monthly drills of his unit and can continue to do so.

CLAIMS FOR RELIEF

* 27. The punishment imposed upon plaintiff by removing him from active duty and transferring him to Standby Reserve status are violative of plaintiff's constitutional rights. Such punishment, imposed for the reason that plaintiff printed and distributed a petition to governmental officials, violates the due process clause of the Fifth Amendment and violates plaintiff's right to assemble and petition congress for redress of grievances under the First Amendment. In addition, such punishment violates 10 U.S.C. § 1034, which provides: "No person may restrict any member of the Armed Forces in communicating with a member of congress unless the communication is unlawful or violates a regulation necessary to the security of the United States."

WHEREFORE, plaintiff prays that this Court enter its order and judgment:

* (1) declaring that the actions of defendants in removing plaintiff from Active Duty and transferring him to the Standby Reserve violated plaintiff's rights under

the First and Fifth Amendments to the Constitution of the United States and under 10 U.S.C. § 1034;

* (2) deleted

(3) enjoining and ordering defendants to cease and refrain from any and all punitive actions taken or threatened to be taken by reason of his printing and circulating a petition to governmental officials;

(4) restoring plaintiff to all benefits and privileges to which he was entitled to prior to his removal from active duty status on April 17, 1974, including future active duty;

(5) mandating that plaintiff be paid the amount he would have been paid if he had not been unlawfully removed from active duty, the sum of $1,176.00.

(6) for such further and additional relief as the Court may deem appropriate; and

(7) awarding costs of this action and reasonable attorneys fees to plaintiff.

DATED: 9-11-74

Respectfully submitted,

BREECKER, COBIN & DAYLEY

by /s/ David M. Cobin
DAVID M. COBIN

VERIFICATION

STATE OF CALIFORNIA)
)
COUNTY OF ALAMEDA) ss.

ALBERT E. GLINES, being first duly sworn, deposes and says that he is the plaintiff in this proceeding; that he has read the foregoing Amended Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters therein alleged on information and belief and that as to those matters, he believes them to be true.

Dated: 9/11/74

/s/ Albert E. Glines
ALBERT E. GLINES

Subscribed and Sworn to before me this 11th day of September, 1974.

/s/ Melvin K. Dayley

Notary Public in and For Said
County and State

DEAR SENATOR CRANSTON:

WE, THE UNDERSIGNED, ALL AMERICAN CITIZENS SERVING IN THE ARMED SERVICES OF OUR NATION, REQUEST YOUR ASSISTANCE IN CHANGING THE GROOMING STANDARDS OF THE UNITED STATES AIR FORCE.

WE FEEL THAT THE PRESENT REGULATIONS ON GROOMING HAVE CAUSED MORE RACIAL TENSION, DECREASE IN MORALE AND RETENTION, AND LOSS OF RESPECT FOR AUTHORITIES THAN ANY OTHER OFFICIAL AIR FORCE POLICY.

WE ARE SIMILARLY PETITIONING SENATOR TUNNEY, SENATOR JACKSON, CONGRESSMAN MOSS, AND THE SECRETARY OF DEFENSE IN THE HOPE THAT ONE OF OUR ELECTED OR APPOINTED OFFICIALS WILL HELP CORRECT THIS PROBLEM.

DEAR SECRETARY OF DEFENSE:

WE, THE UNDERSIGNED, ALL AMERICAN CITIZENS SERVING IN THE ARMED SERVICES OF OUR NATION, REQUEST YOUR ASSISTANCE IN CHANGING THE GROOMING STANDARDS OF THE UNITED STATES AIR FORCE.

WE FEEL THAT THE PRESENT REGULATIONS ON GROOMING HAVE CAUSED MORE RACIAL TENSION, DECREASE IN MORALE AND RETENTION, AND LOSS OF RESPECT FOR AUTHORITIES THAN ANY OTHER OFFICIAL AIR FORCE POLICY.

WE ARE SIMILARLY PETITIONING SENATOR CRANSTON, SENATOR TUNNEY, SENATOR JACKSON, AND CONGRESSMAN MOSS IN THE HOPE THAT ONE OF OUR ELECTED OR APPOINTED OFFICIALS WILL HELP CORRECT THIS PROBLEM.

DEAR SENATOR JACKSON:

WE, THE UNDERSIGNED, ALL AMERICAN CITIZENS SERVING IN THE ARMED SERVICES OF OUR NATION, REQUEST YOUR ASSISTANCE IN CHANGING THE GROOMING STANDARDS OF THE UNITED STATES AIR FORCE.

WE FEEL THAT THE PRESENT REGULATIONS ON GROOMING HAVE CAUSED MORE RACIAL TENSION, DECREASE IN MORALE AND RETENTION, AND LOSS OF RESPECT FOR AUTHORITIES THAN ANY OTHER OFFICIAL AIR FORCE POLICY.

WE ARE SIMILARLY PETITIONING SENATOR CRANSTON, SENATOR TUNNEY, CONGRESSMAN MOSS, AND THE SECRETARY OF DEFENSE IN THE HOPE THAT ONE OF OUR ELECTED OFFICIALS WILL HELP CORRECT THIS PROBLEM.

DEAR SENATOR TUNNEY:

WE, THE UNDERSIGNED, ALL AMERICAN CITIZENS SERVING IN THE ARMED SERVICES OF OUR NATION, REQUEST YOUR ASSISTANCE IN CHANGING THE GROOMING STANDARDS OF THE UNITED STATES AIR FORCE.

WE FEEL THAT THE PRESENT REGULATIONS ON GROOMING HAVE CAUSED MORE RACIAL TENSION, DECREASE IN MORALE AND RETENTION, AND LOSS OF RESPECT FOR AUTHORITIES THAN ANY OTHER OFFICIAL AIR FORCE POLICY.

WE ARE SIMILARLY PETITIONING SENATOR CRANSTON, SENATOR JACKSON, CONGRESSMAN MOSS, AND THE SECRETARY OF DEFENSE IN THE HOPE THAT ONE OF OUR ELECTED OFFICIALS WILL HELP CORRECT THIS PROBLEM.

DEAR CONGRESSMAN MOSS:

WE, THE UNDERSIGNED, ALL AMERICAN CITIZENS SERVING IN THE ARMED SERVICES OF OUR NATION, REQUEST YOUR ASSISTANCE IN CHANGING THE GROOMING STANDARDS OF THE UNITED STATES AIR FORCE.

WE FEEL THAT THE PRESENT REGULATIONS ON GROOMING HAVE CAUSED MORE RACIAL TENSION, DECREASE IN MORALE AND RETENTION, AND LOSS OF RESPECT FOR AUTHORITIES THAN ANY OTHER OFFICIAL AIR FORCE POLICY.

WE ARE SIMILARLY PETITIONING SENATOR CRANSTON, SENATOR TUNNEY, SENATOR JACKSON, AND THE SECRETARY OF DEFENSE IN THE HOPE THAT ONE OF OUR ELECTED OFFICIALS WILL HELP CORRECT THIS PROBLEM.

EXHIBIT G

DEPARTMENT OF THE AIR FORCE

Headquarters 349th Military Airlift Wing
(Associate) (AFRes)
Travis Air Force Base, California 94635

[SEAL]

17 April 1974

REPLY TO
ATTN OF 301CC (3361)

SUBJECT Administrative Hold

TO Capt Albert E. Glines

1. Effective immediately, you are placed in administrative hold and will not be scheduled for flying activities until cleared by the 349 MAWg Commander's office.
2. Your tour of Active Duty is terminated effective 2400 hours, 17 April 1974. No further Active or Inactive Duty for Training will be approved without formal notification.

/s/ William O. White, Jr.
WILLIAM O. WHITE, JR., Major, USAFR
Operations and Training Officer, 301 MASq

Cy to: 349 MAW/CC
Major Cooney

EXHIBIT H

CC 26 April 1974

Reassignment to ARPC and Transfer to Straight Reserve Status

Capt Albert E. Glines
Rte 1, Box 200
Gerber, CA 96035

1. It is my intention to recommend to the Commander of AFRES that you be reassigned to ARPC and transferred to the Standby Reserve in accordance with the provisions of Table 12-1, Rule 8, AFM 35-3. This action is being taken based on your failure to meet the professional standards expected of an officer in the Air Force Reserve.

2. On 15 April 74, while in ... active duty status at Anderson AFB, you introduced into the system a petition which brought undue embarrassment on the Air Force Reserve. This action was committed even though I had verbally advised you in advance that your circulation of a petition would certainly bring discredit to the Air Force Reserve and that you were to refrain from such conduct.

3. In prior personal contact you were advised that you should comply with Air Force standards. Your response to this advice was to have your head shaved to a bald condition. Conduct portrayed by the above actions cannot be tolerated in an Air Force Reserve officer.

4. This is to advise you that you may submit any document in your behalf and that all documents and evidence bearing on the case will be submitted to the Commander of AFRES for final determination. Any documentation you may desire to submit must be forwarded to arrive this headquarters not later than 8 May 74 on which date the entire case will be forwarded for finalization.

/s/ James L. Wade
JAMES L. WADE, Colonel, USAFR
Commander

J-5

DEPARTMENT OF THE AIR FORCE

605th Military Airlift Support Squadron (MAC)
APO San Francisco 96334

[SEAL]

19 April 1974

Major General John F. Gonge
Commander, Twenty-Second Air Force
Travis Air Force Base, California

Dear General Gonge,

Attached please find two statements made by members of my command relating to their involvement with a petition which was reported and forwarded in my earlier letter.

All told eight of my personnel were signatories to the petition, each feeling, I susject, it was a "noble cause" and thus, in need of their support. The members were young, junior enlisted types, all of whom have since been counselled and shown the error of their ways.

I should think that additional and more detailed information ought to be forthcoming from an interview with Captain Glines. I would appreciate it if I could be notified and informed of the final disposition of this incident.

Sincerely,

/s/ Harley S. Black
HARLEY S. BLACK, Colonel, USAF
Commander

2 Atch

1. Statement, Sgt Bradley M. Wolf, FR354-44-2199
2. Statement, Sgt Jerry G. Alexander, FR545-78-5916

Global in Mission . . . Professional in Action

J-6

STATEMENT

At approximately 0300 hours, 15 April 1974, I, Sgt Bradley M. Wolf, FR354-44-2199, entered a C-5A aircraft, 69-0002, to perform routine maintenance. While on the aircraft, I was approached by a crew member, whom I believe was an officer, and given a petition dealing with the Air Force grooming standards. Along with the petition I was given a name and address of an individual in California to whom we were to send the petition. The individual's name and address is Al Glines, Rt Box 200, Gerber, Calif, 96035. I carried the subject petition off the aircraft and brought it to my shop where it remained. A few individuals came to my shop, read the subject petition, agreed with the material in the petition, and signed it, myself included. At no time were there any solicitations of signatures involved by anyone. I was relieved from duty at approximately 0730 hours. When I left the section the subject petition still remained on our shop's desk. This is the only involvement I had with the petition until I was called to explain my involvement to Colonel Black.

/s/ Bradley M. Wolf
BRADLEY M. WOLF, FR354-44-2199
Sgt. USAF
Radio Shop

J-7

STATEMENT

At approximately 0400 hours on the 15th of April 1974 I, Sgt Jerry G. Alexander FR545-78-5916, was in the Radio Shop 605MASS, Andersen AFB, Guam. I noticed a petition on the desk and read it. My understanding at that time was that the petition came from an air crew member on MAC aircraft C-5A 690002 which a number of other members of the 605th and myself had just returned from. Because I agreed in principle with the petition, being in regards to the reevaluation of Air Force grooming standards. I signed the petition. I saw a few of the other members of the Avionics Branch sign it also, but no one prompted me and, to my knowledge, no one else was prompted to sign the petition. These are the circumstances that I encountered in this incident.

/s/ Jerry G. Alexander
JERRY G. ALEXANDER, Sgt, USAF
FR545-78-5916

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Category: CIVIL RIGHTS

No. C-74-1264 SAW

ALBERT EDWARD GLINES, Captain USAF Reserves, PLAINTIFF

vs.

JAMES L. WADE, Commander 349th Material Airlift Wing; MAJOR GENERAL ROLLIN B. MOORE, JR., Commander Western Air Force Reserve Region; MAJOR GENERAL JOHN F. GONGE, Commander 22d Air Force; JOHN L. MCLUCAS, Secretary of the Air Force; JAMES SCHLESINGER, Secretary of Defense, DEFENDANTS

AFFIDAVIT

Affiant, being first duly sworn upon his oath, deposes and states as follows:

I am John F. Gonge, Major General, United States Air Force, and a named defendant in the above styled action. I am now, and have been continuously since 29 August 1972, the Commander, Twenty-Second Air Force, Military Airlift Command, headquartered at Travis Air Force Base, California.

As Commander of Twenty-Second Air Force, I am the operational manager of global military airlift operations for the extra extending, pole to pole, westward from the Mississippi River to the eastern border of India.

The 349th Military Airlift Wing (Associate), United States Air Force Reserve, is headquartered at Travis Air Force Base, California, and is an essential part of Twenty-Second Air Force. Members of the Wing are fully integrated into Twenty-Second Air Force operations and serve, during periods of active duty training, as aircrew members on missions throughout the Twenty-Second Air Force area of responsibility as associates of

the 60th Military Airlift Wing, a regular Air Force organization at Travis Air Force Base, California.

Because the role of Twenty-Second Air Force is so vital to the security and defense of the United States, and because Twenty-Second Air Force aircrews operate highly sophisticated aircraft on demanding overseas missions, it is essential that members of these aircrews be of the highest qualifications in their specialty and maintain at all times, the highest professional standards.

During late April 1974, it was brought to my attention that, on 15 April 1974, Albert E. Glines, Captain, United States Air Force Reserve, 349th Military Airlift Wing, while serving on active duty training as a crewmember on a Twenty-Second Air Force aircraft, had allegedly distributed to other Air Force members a written petition, addressed to the Secretary of Defense, during a stop of his aircraft at Andersen Air Force Base, Guam.

I thereupon directed the Commander, 605th Military Airlift Support Squadron, senior commander under my jurisdiction at Andersen Air Force Base, to inquire into the truthfulness of this allegation and the surrounding circumstances, and to report his findings to me. In due course he advised me that Captain Glines had indeed distributed such a petition to a young Air Force Sergeant, while on the flightline at Andersen Air Force Base, and the Sergeant had passed the petition on to several friends. He further advised me that Captain Glines had not obtained permission from the Base Commander at Andersen Air Force Base, to distribute this petition.

Since distribution of such a petition by an Air Force member, without prior permission of the Base Commander concerned, is a clear violation of Air Force Regulation 35-15, dated 12 June 1970, and Military Airlift Command Supplement one thereto, dated 27 April 1973, I began to have serious doubts regarding Captain Glines' judgment and professional qualifications. I discussed the incident with the Commander, 349th Military Airlift Wing, and concluded therefrom, that Captain Glines did not meet the professional standards required of crew members on Twenty-Second Air Force aircraft.

I therefore advised the Commander, 349th Military Airlift Wing that I desired that Captain Glines no longer be permitted to serve as a crewmember on Twenty-Second Air Force aircraft.

Further affiant sayeth not.

/s/ John F. Gonge
JOHN F. GONGE, Major General, USAF

Subscribed and sworn to before me this 7th day of April 1975 at Travis Air Force Base, California.

/s/ Carolyn V. Bradley
Notary Public in and For Said County and State

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-74-1264 WHO

ALBERT EDWARD GLINES, Captain USAF Reserves,
PLAINTIFF

vs.

JAMES L. WADE, ET AL., DEFENDANTS

OPINION AND ORDER

This lawsuit brings into question the authority of the federal courts to safeguard the constitutional rights of members of the military. Plaintiff, a captain in the Air Force Reserves, was transferred from the Active to the Standby Reserves because he circulated a petition without first complying with existing base petitioning regulations. On cross-motions for summary judgment in this case, this Court has previously determined that the pertinent Air Force regulations were unconstitutionally overbroad and that the transfer violated plaintiff's First Amendment rights.[1] The proper amount of damages, if any, due plaintiff as compensation for this unconstitutional transfer, raising disputed factual issues, was not resolved by the cross-motions and is the sole question presently before the Court.

The evidence on damages was presented to the Court, sitting without a jury. For the reasons hereinafter set forth, I find that plaintiff is entitled to recover the back pay he would have earned had he not been illegally transferred from the Active Reserves, minus his civilian earnings.

I.

Captain Glines has been a member of the Air Force Reserves for over 15 years. In April, 1974, while on Active Duty Status at Travis Air Force Base, he cir-

[1] Memorandum Opinion and Order filed May 3, 1975.

culated a petition aimed at relaxing Air Force hair-length regulations. Because Captain Glines failed to comply with base regulations requiring prior approval for the distribution of petitions, he was removed from Active Duty Status to the Standby Reserves. Due to this change in assignment, Captain Glines has lost, and continues to lose, pay and pension benefits.

The letter notifying Captain Glines of his dismissal from the Active Reserves and his transfer to the Standby Reserves stated that his actions in circulating the petition and shaving his head to a bald condition demonstrated that he had failed "to meet the professional standards expected of an officer in the Air Force." Although the letter of dismissal stated dual reasons for the Air Force actions, the defendants have admitted that had it not been for the distribution of the petition the decision to remove Captain Glines from Active Duty would not have been made at that time.

Following his reassignment, Captain Glines unsuccessfully attempted to obtain a steady job in civilian employment. He also tried to be reclassified for Active Duty with the Air Force Reserves, either with his own or with some other unit. In his effort to be reclassified, Captain Glines spoke with several officials in his former Air Force unit as well as with sis congressman. After these informal efforts failed, Captain Glines filed a formal application seeking reassignment on an Active Duty basis with another reserve unit. All of these efforts proved fruitless. Since his transfer to the Standby Reserves, Captain Glines has only been able to find civilian employment on a part-time and infrequent basis.

II.

Defendants first contend that Captain Glines is not entitled to reinstatement or back pay since dismissal from the reserves or transfers within the military are matters wholly within the discretion of the military. 10 U.S.C. § 1162 (1956); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953). While it is true that the President has broad discretion to discharge reservists and the Supreme Court has cautioned the judiciary about interfering in internal mili-

tary affairs, neither Section 1162 nor *Orloff* immunizes military discharges or transfers from judicial review when these actions abridge a serviceman's constitutionally protected rights. *Carter* v. *United States*, 509 F.2d 1150, 1156 (Ct. Cl. 1975); *Cortright* v. *Resor*, 447 F.2d 245, 254-255 (2d Cir. 1971); *Zitser* v. *Walsh*, 352 F.Supp. 438, 442-443 (D. Conn. 1972). The protection of First Amendment rights, even of citizens who are members of the military, is a matter of federal judicial concern and cannot be relegated to the exclusive province of the military. Here, Captain Glines was transferred in retaliation for his petitioning activities although these activities were protected by the First Amendment. The military cannot preclude judicial review of this unconstitutional punishment.

The defendants try to narrow judicial intervention by distinguishing between military discharges and transfers within the military. It is the defendants' position that there is no redress for a serviceman whose constitutional rights are curtailed, no matter how severely, just as long as the military actions fall short of a discharge. However, in *Glazier* v. *Hackel*, 440 F.2d 592, 597 (9th Cir. 1971), this Circuit rejected the same contention, holding that the propriety of judicial review cannot logically depend on whether the military action has taken the form of a discharge or duty reassignment order.

The defendants finally contend that the facts here do not warrant judicial intervention since Captain Glines was transferred for the dual reasons that he (1) had shaved his head and (2) also circulated a petition. The Air Force admits that the petitioning activities were at least part of the motivation for the reassignment.

The existence of a dual motive or independent grounds for transfering Captain Glines cannot legitimate the Air Force actions. It is well settled than an individual's constitutional rights may not be circumvented by simply intertwining a constitutionally permissible and constitutionally impermissible bases for the infringement. Where, as here, at least part of the motivation was or could have been retaliation for the exercise of First Amend-

ment rights, the constitutionally permissible cannot be severed from the impermissible, and the punishment cannot stand. *Thomas* v. *Collins*, 323 U.S. 516 (1944); *Street* v. *New York*, 394 U.S. 576 (1969).

III.

As a general rule, a reservist is entitled to recover back pay to compensate him for an illegal discharge (or transfer) as long as the serviceman was willing and able to serve. *Carter* v. *United States*, *supra* at 1155. While there will necessarily be some uncertainty as to the exact amount of constructive Active Duty pay due an illegally-transferred serviceman, this uncertainty works an equal hardship on all parties. The Court will not deny an award of back pay by conjecturing that the serviceman might in any event have been legitimately terminated or transferred, nor will the Court increase the amount of damages by speculating on any promotions the serviceman might have obtained.

In this case the evidence established that but for his petitioning activities, Captain Glines would have successfully completed his navigator instructor upgrade training program [2] and would have remained on Active Duty on the same basis as the other members of his reserve unit. This would have entitled Captain Glines to compensation for Active Duty for training service for 249 days for the year 1974, covering the period from April 19, 1974 (when Captain Glines was transferred), to December 31, 1974, and for 149 days in the year 1975, covering the period from January 1, 1975, through August 31, 1975. Captain Glines would also have been entitled to 48 Unit Training Assemblies and 66 Active Duty Days for each calendar year following 1975.

Although Captain Glines also seeks payment for medical expenses incurred by his dependents during the time

[2] Since completion of the navigator instructor upgrade program would only change Captain Gline's status within his existing rank as a captain, and would not affect his Captain's rank classification; completion of the upgrade program does not constitute a promotion. Awarding pay based on Active Duty call for a navigator instructor does not, therefore, require the Court to impermissibly speculate.

he claims he would have been on Active Duty, I find it is too speculative to say that the timing of the needed medical treatments would have coincided with the days Captain Glines would actually have been on Active Duty and would have been eligible for medical coverage. Accordingly, I deny recovery for Captain Gline's medical expenses or for those of his dependents.

Since Captain Glines made reasonable efforts to mitigate his damages by seeking both civilian employment and reassignment within the Air Force, there is no reason to pare down the back-pay entitlement as set out above for any lack of diligence on his part. However, the plaintiff concedes that the Air Force is entitled to a setoff for any civilian earnings made by Captain Glines during the time he would have been on Active Duty for training. *Yee* v. *United States*, 512 F.2d 1383 (Ct. Cl. 1975).

Accordingly, IT IS HEREBY ORDERED that:

1. Captain Glines shall recover back pay computed at the applicable military rates for 249 days of Active Duty for training service for the year 1974, commencing April 19 and continuing through December 31, 1974; and 149 days for the year 1975, commencing January 1, 1975, and continiung through August 31, 1975.

2. For each calendar year following 1975 until he is reinstated as a navigator instructor on an Active Duty basis in the Air Force Reserves, Captain Glines shall recover back pay computed at the applicable military rates for 48 Unit Training Assemblies and 66 Active Duty days.

3. The Air Force shall deduct from the award of back pay set forth in paragraph 1 above, the gross civilian earnings made by Captain Glines from April 19, 1974, through August 31, 1975.

4. Plaintiff shall submit to the Court on or before December 15, 1975, a certificate of counsel setting forth the sum of money due Captain Glines as back pay for the years 1974 and 1975, and a form of judgment consistent with this Opinion, both approved by counsel for the defendants.

The foregoing constitutes the Findings of Fact and Conclusions of Law required by Rule 52 of the Federal Rules of Civil Procedure.

Dated: November 26, 1975.

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-74-1264-WHO

ALBERT EDWARD GLINES, Captain, USAF Reserve,
PLAINTIFF

vs.

JAMES L. WADE, Commander, 349th Material Airlift Wing, ET AL., DEFENDANTS

JUDGMENT

This matter having come on for hearing on cross-motions for summary judgment on May 13, 1975, and the Court having entered a Memorandum Opinion and Order on May 30, 1975, and this matter having come on for trial on the issue of damages on September 26, 1975, and the Court having entered an Opinion and Order on November 26, 1975,

IT IS THE JUDGMENT OF THIS COURT:

1. Air Force Regulation 30-1(9) is hereby declared to be null, void and inoperative, as being in conflict with the First Amendment to the Constitution of the United States.
2. Air Force Regulation 35-15 paragraphs 3(a)(1) and 3(a)(2), in so far as they relate to petitions to the government for redress of grievances, are declared to be null, void and inoperative, as being in conflict with the First Amendment to the Constitution of the United States.
3. Defendants are hereby ordered to restore Plaintiff immediately to Ready Reserve status.
4. Defendants are further ordered to place Plaintiff immediately on Active Duty in the same capacity he held prior to his removal from Active Duty on April 17, 1974.
5. Defendants are further ordered to place Plaintiff

as soon as practicable on a program whereby he may regain the currency and proficiency that Plaintiff has lost as a result of his removal from Active Duty and transfer to Ready Reserve status.

6. Defendants are further ordered to place Plaintiff as soon as practicable on a C-5 upgrade program comparable to that in which Plaintiff was participating prior to his removal from Active Duty on April 17, 1974.

7. Defendants are hereby directed that they or their successors in office, agents, or employees expunge and destroy any reference relating to Plaintiff's preparing and circulating a petition to the government for redress of grievances and any administrative or disciplinary action resulting therefrom, contained in any record in the possession of the Department of Defense, the United States Air Force, or agents thereof.

8. Defendants and their successors in office, their agents, employees and persons working in concert with them are hereby enjoined from taking punitive action against Plaintiff for the petitioning activities that are the subject of this lawsuit.

9. Defendants and their successors in office, their agents, employees and persons working in concert with them are hereby enjoined from enforcing the terms of Air Force Regulation 30-1(9) and 35-15, so as to interfere with the circulation by Plaintiff of the petition which was the subject of this lawsuit, whether such circulation should take place on or off an Air Force facility.

10. Defendants are further ordered to pay to plaintiff for back pay through December 31, 1975, the sum of twenty-five thousand eight hundred fifty-seven and eighty hundredths dollars ($26,335.16), with interest thereon at the rate of seven (7) per cent per year as provided by law, and his costs of this action. The Air Force shall deduct from the gross back pay owed to plaintiff $4,302.25 —plaintiff's gross civilian pay between the time of dismissal and August 31, 1975. The net amount of back pay due to the plaintiff to December 31, 1975 is $22,032.91.

11. Defendants are further ordered to pay to plaintiff for back pay for each calendar year following 1975, until

plaintiff is reinstated as a navigator on an active duty basis in the Air Force Reserves, a sum of pay computed at applicable military rates for 48 Unit Training Assemblies and 66 active duty days per year, or pro rata for an elapsed portion of a year.

Dated: Jan. 16, 1976

/s/ William H. Orrick
U.S. District Judge

APPROVED AS TO FORM:

/s/ Stephen A. Shefler
STEPHEN A. SHEFLER
Assistant U.S. Attorney
for Defendants

SUPREME COURT OF THE UNITED STATES

No. 78-1006

HAROLD R. BROWN, Secretary of Defense, ET AL.,
PETITIONERS

v.

ALBERT EDWARD GLINES

ORDER ALLOWING CERTIORARI. Filed March 19, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is set for oral argument in tandem with No. 78-599, *Secretary of the Navy* v. *Huff*.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 293519 393

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1006

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,

Petitioners,

v.

ALBERT EDWARD GLINES,

Respondent.

On Petition For A Writ Of Certiorari To The

United States Court of Appeals

For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1006

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,

Petitioner,

v.

ALBERT EDWARD GLINES

On Petition For a Writ of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Albert Edward Glines, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 586 F.2d 675.

QUESTIONS PRESENTED

1. Whether Air Force requlations that require military personnel to obtain approval before circulating petitions to members of Congress on Air Force bases are invalid under 10 U.S.C. 1034.

2. Whether Air Force regulations that require military personnel to obtain approval before circulating petitions on base violate the First Amendment.

REASONS WHY THE WRIT SHOULD BE DENIED

Summary

The petition for a writ of certiorari should be denied because the issues raised in the petition are not of widespread importance since the armed services remain free to protect legitimate military interests and these issues arise infrequently and because there is no conflict among the lower courts.

1. THE COURT OF APPEALS DECISION DOES NOT PREVENT THE ARMED SERVICES FROM PROTECTING LEGITIMATE MILITARY INTERESTS.

The issues raised in the instant case are also raised in petitions for writs of certiorari in Brown v. Allen, No. 78-1005 and Secretary of the Navy v. Huff, No. 78-599. None of these three decisions prohibits the armed services from regulating petitioning activities by reasonable time, place and manner restrictions adapted to the military context, or from punishing service personnel whose petitioning activities threaten a disturbance. None of these decisions involve a combat zone and none prevents the armed services from imposing a prior restraint on petitioning activities in a combat zone. These decisions only prohibit the imposition of a prior restraint on the right to petition outside of a combat zone.

The Court of Appeals in the instant case recognized the necessity for military discipline. Glines v. Wade, 586 F.2d at 680 (9th Cir. 1978); Glines petition at 11a-12a. However, the court concluded:

> Punishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty periods, and protection from pressure by superiors who are seeking signatures would adequately protect the government's interest.

Id. The court specifically approved the time, place and manner restrictions for petitions on board a ship that were adopted by the district court in Allen v. Monger, 404 F. Supp. 1081, 1090-91 (N.D. Cal. 1975); Allen petition at 30a-32a. These restrictions clearly show the flexibility retained by the armed services in

regulating on-base petitioning. They allow an outright ban on petitions in a combat zone. Outside of a combat zone, petitions could be prohibited (a) in work areas, (b) by or to persons on duty, (c) in sleeping areas, (d) in the mess hall during meals, and (e) by superior officers in a manner that coerces signatures. In addition, the district court provided for reasonable limitations on the use of bulletin boards as a petitioning medium. Allen v. Monger, supra at 1090-91; Allen petition at 30a-31a; approved, Glines v. Wade, supra at 680, n.9; Glines petition at 12a, n.9.

Petitioning is one of the most peaceful forms of group communication. Should petitioning activities, however, lead to a disturbance of the peace or threaten good order and discipline, they are punishable under 10 U.S.C. §§ 916, 917 and 934 (1976), (Articles 116, 117, and 134, respectively, of the Uniform Code of Military Justice [UCMJ]).[1] Moreover, acts done with the intent of causing a disturbance are punishable under 10 U.S.C. 880 (1976), (Article 80 of the UCMJ),[2] without awaiting any disturbance.

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1. 10 U.S.C. § 916 (Art. 116) states:

   Riot or breach of peace

   Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.

   10 U.S.C. § 917 (Art. 117) states:

   Provoking speeches or gestures:

   Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct.

   10 U.S.C. § 934 (Art. 134) states:

   General article

   Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

2. 10 U.S.C. § 880 (Art. 80) states:

   Attempts

   (a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense. (Continued)

Thus, the armed services are quite capable of protecting their interests without a prior restraint on the right to petition. The Court of Appeals decisions in these cases need not be disturbed.

2. THE ISSUES RAISED IN THE GOVERNMENT'S PETITION ARISE INFREQUENTLY.

Disputes regarding the right to petition on a military base seldom arise, so there is no pressing need for a Supreme Court pronouncement. To counsel's knowledge, aside from the current cases on petition for writs of certiorari, only one other case involving the right to petition on a military base has ever been filed in a federal court. [Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975).]

3. THERE IS SUBSTANTIAL AGREEMENT AMONG LOWER COURT JUDGES WHO HAVE RULED ON THE ISSUES RAISED IN THE GOVERNMENT'S PETITION.

The current cases on petition for writs of certiorari, Glines, Allen and Huff, are the only court decisions involving the right to petition on a military base outside of a combat zone.[3] In these three cases, the Courts of Appeals for the Ninth Circuit and the District of Columbia agreed that prior restraints on petitioning outside a combat zone violate 10 U.S.C. 1034. In Glines v. Wade, the Court of Appeals for the Ninth Circuit additionally found that the Air Force regulation violated the First Amendment. Glines, supra at 681; Glines petition at 13a-14a. Thus, there is no conflict among the circuits on these issues.

Moreover, there is substantial agreement among the judges who have ruled on these issues. Of the nine judges at the district and court of appeals levels reviewing the various military regula-

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2. (Cont'd)

   (b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

   (c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

3. Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975), involved on-base petitioning in a combat zone.

tions involved, eight have agreed that the regulations violated 10 U.S.C. 1034. [Judge Tamm is the lone dissenter, in Huff v. Secretary of the Navy, 575 F.2d 907 (D.C. Cir. 1978), Huff petition, 22a-26a (dissenting opinion).] Of the six judges who have reached the constitutional issue, all six found a violation of the First Amendment. See Glines v. Wade, 586 F.2d at 681, 401 F. Supp. at 132, Glines petition at 13a-14a, 26a; Allen v. Monger, 404 F. Supp. at 1089-90, Allen petition at 28a-29a; Huff v. Secretary of the Navy, 413 F. Supp. at 809, Huff petition at 56a-57a.

The lower court decisions will provide adequate guidelines for revisions of the applicable regulations. That the Glines decision reached the constitutional issue will not obscure the standard for revising these regulations because once the prior restraint is removed to comply with 10 U.S.C. 1034, the regulations will also comply with the First Amendment.

4. CERTIORARI SHOULD BE DENIED IN ALL THREE CASES.

The government has recommended that the disposition of the Petition for Writ of Certiorari in Brown v. Glines, No. 78-1006 should be deferred pending disposition of the petition in Secretary of the Navy v. Huff, No. 58-599. This same recommendation was made in connection with Brown v. Allen, No. 78-1005. The arguments enumerated above also justify denying the petitions in Huff and Allen.

CONCLUSION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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Supreme Court, U. S.
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No. 78-1006

In the Supreme Court of the United States

OCTOBER TERM, 1978

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

ALBERT EDWARD GLINES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1006

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ALBERT EDWARD GLINES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 586 F.2d 675. The opinion of the district court (Pet. App. 17a-27a) is reported at 401 F. Supp. 127.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1978. The petition for a writ of certiorari was filed on December 20, 1978, and was granted on March 19, 1979 (A. 40). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Air Force regulations that require military personnel to obtain approval before circulating petitions on military bases violate the First Amendment.

2. Whether these regulations are invalid under 10 U.S.C. 1034 as applied to petitions addressed to members of Congress.

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 10 U.S.C. 1034 provides:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

3. Department of Defense Directive 1325.6 (1969) provides in relevant part:

I. PURPOSE AND APPLICABILITY

This Directive provides general guidance governing the handling of dissident activities by members on active duty of the Army, Navy, Air Force, and Marine Corps. Specific problems can, of course, be resolved only on the basis of the particular facts of the situation and in accordance with the provisions of applicable Department regulations and the Uniform Code of Military Justice.

II. POLICY

It is the mission of the Department of Defense to safeguard the security of the United States. The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. On the other hand, no Commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible Commander.

III. SPECIFIC GUIDELINES

The following Guidelines relate to principal activities in this area which the Armed Forces have encountered:

A. *Possession and Distribution of Printed Materials*

1. A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchange and military libraries. In the case of distribution of publications through other than official out-

lets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission. When he makes such a determination, the distribution will be prohibited.

2. While the mere possession of unauthorized printed material may not be prohibited, printed material which is prohibited from distribution shall be impounded if the Commander determines that an attempt will be made to distribute.

3. The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited.

4. *a.* Air Force Regulation (AFR) 30-1(9) provides in pertinent part:

Right of Petition Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition to the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander.

b. AFR 35-15(3)(a) provides:

Possession and Distribution of Written or Printed Materials:

(1) No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander or his designee. A copy of the material with a proposed plan or method of distribution or posting will be submitted when permission is requested. Distribution of publications and other materials through the United States mail or through official outlets, such as military libraries and exchanges, may not be prohibited under this regulation.

(2) When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances.

(3) Mere possession of materials unauthorized for distribution or posting may not be prohibited unless otherwise unlawful. However, such material may be impounded if a member of the Armed Forces distributes or posts or attempts to distribute or post such material within the installation. Im-

pounded materials will be returned to the owner when departing the installation unless determined to be evidence of a crime.

(4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials.

(5) In general, installation commanders should encourage and promote the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues.

STATEMENT

1. Each of the military departments has adopted regulations that require servicemen who wish to distribute petitions or other written materials on a military base to obtain the prior approval of their commanding officers. See, *e.g.*, FMFO 5370.3 (Navy regulation); AFR 30-1(9) (Air Force regulation).[1] These regulations are derived from Department of Defense (DOD) Directive 1325.6 (1969). The Directive provides that "a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loy-

[1] The Army regulations are discussed in *Schneider* v. *Laird*, 453 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972). See also *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971). The Navy regulations are the subject of *Secretary of the Navy* v. *Huff*, No. 78-599, which is to be argued in tandem with this case.

alty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission." DOD Dir. 1325.6 ¶ III(A)(1). The policy of the Directive is to preserve the "service member's right of expression * * * to the maximum extent possible, consistent with good order and discipline and the national security." *Id.* at ¶ II. Thus, the Directive counsels that the "fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited." *Id.* at ¶ III(A)(3).

Air Force regulations provide that "the public solicitation or collection of signatures on a petition by any person within an Air Force facility * * * is prohibited unless first authorized by the commander" and that "[n]o member of the Air Force will distribute or post any printed or written material * * * without permission of the commander or his designee * * *." AFR 30-1(9), 35-15(3)(a)(1). The commander may withhold approval for the distribution of such material if he determines that "a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result." AFR 35-15(3)(a)(2). The commander may not prohibit distribution of any material "solely on the ground that the material is critical of Government policies or officials." AFR 35-15(3)(a)(4).

2. In 1974, while respondent was on active duty for training as a captain in the Air Force Reserve,

he drafted petitions to the Secretary of Defense and to several Members of Congress opposing military hair length standards (Pet. App. 1a-2a). Respondent was informed by his superiors at Travis Air Force Base that the on-base circulation of petitions was permitted only with the approval of the base commander. Respondent then circulated the petitions off base (*id.* at 3a).

In April 1974, while respondent was at Anderson Air Force Base in Guam, he gave the petitions to an Air Force sergeant who gathered eight signatures on the petitions. He did not seek permission to circulate the petitions. Because of the unauthorized circulation of the petitions, respondent was removed from active duty status and charged with failure to meet the professional standards of a reserve officer. He declined to submit evidence on his behalf. The charges were sustained, and respondent was reassigned to the standby reserve (Pet. App. 4a). Respondent then brought this action seeking declaratory and injunctive relief, reinstatement and back pay, alleging that the prior approval regulations violate 10 U.S.C. 1034 and the First Amendment (A. 15).

3. The district court granted respondent's motion for summary judgment. The court held that the regulations, "[o]n their face, * * * suffer from considerable overbreadth" (Pet. App. 24a) and "impose[] a considerable burden upon the free exercise of the First Amendment right of petition for redress of grievances" (*id.* at 25a). Finding that "the military need to control petitioning arises only in extraordinary circumstances (such as in a combat zone * * * or in an induction center * * *)," the court concluded that the regulations violate the First Amendment (*id.* at 26a). The court entered a judgment declaring the prior approval requirement of the regulations to be unconstitutional, enjoining the Air Force from enforcing the regulations against respondent, and ordering respondent's reinstatement to active duty with $22,032.91 in back pay.

4. *a.* The court of appeals affirmed in part and vacated and remanded in part. Relying on its decision in *Allen* v. *Monger*, 583 F.2d 438 (9th Cir. 1978), petition for cert. pending *sub nom. Brown* v. *Allen*, No. 78-1005, and on *Huff* v. *Secretary of the Navy*, 575 F.2d 907 (D.C. Cir. 1978), cert. granted, No. 78-599 (Mar. 19, 1979), the court held that application of the prior approval requirement to the distribution of petitions to Members of Congress on military facilities is invalid under 10 U.S.C. 1034.[2] This statute prohibits any person from "restrict[ing] any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." The court concluded that "the government has not shown that such restraints are actually necessary to the national security outside a combat zone" (Pet. App. 8a).

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[2] *Allen* held that Navy regulations requiring the prior approval of commanding officers before petitions could be distributed on Navy ships are invalid under 10 U.S.C. 1034.

b. 10 U.S.C. 1034 concerns only petitions to Members of Congress, and one of respondent's petitions was addressed to the Secretary of Defense. The court of appeals therefore reached the question whether the prior approval requirement of the regulations is constitutional (Pet. App. 9a). The court stated that the requirement is "obviously a prior restraint on speech, and prior restraints have the heaviest burden of justification under the First Amendment" (*id.* at 11a). The court concluded that there is no sufficient justification for the challenged regulations. Although it recognized the special disciplinary needs of the military, the court held that the military interests could be satisfied through alternative means, such as "[p]unishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty periods, and protection from pressure by superiors who are seeking signatures * * *" (*id.* at 11a-12a). The court stated that, although the regulations may be constitutionally valid in a combat zone, they are facially unconstitutional because of their overbroad application to protected activity (*id.* at 13a).

c. Despite holding the regulations unconstitutional, the court of appeals observed that monetary claims against the government for amounts in excess of $10,000 are within the exclusive jurisdiction of the Court of Claims; it therefore vacated the award of back pay (Pet. App. 14a-16a). The court remanded the case to the district court with instructions to dismiss the claim for back pay without prejudice or to transfer it to the Court of Claims (*id.* at 16a).[3]

[3] The court's disposition of the case raises a number of problems that we have not presented as questions for resolution by this Court. It may be, for example, that a single claim for relief should not be split in this fashion, with damages aspects sent to the Court of Claims and equitable aspects retained by the district court. At least one court of appeals has held that, when a serviceman brings suit in a district court seeking more than $10,000 in back pay and equitable relief, the entire case should be transferred to the Court of Claims. *Cook* v. *Arentzen*, 582 F.2d 870 (4th Cir. 1978). This will reduce the duplication of judicial effort that is required by the procedure adopted here and will reduce the chance of inconsistent adjudications. Because this bifurcation of the claim is not a defect in this Court's jurisdiction, however, we do not pursue it further. Cf. *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 279 (1977). If this Court should affirm the judgment that the regulations are unconstitutional or conflict with 10 U.S.C. 1034, however, the government may raise in the Court of Claims a number of questions concerning the scope of its authority over the case, including the question whether the doctrine of sovereign immunity permits the award of back pay in a situation such as the instant one. Cf. *United States* v. *Testan*, 424 U.S. 392 (1976). No statute explicitly authorizes the award of back pay to servicemen removed from active duty in response to their defiance of regulations later determined to be unauthorized.

There are a number of other problems with the case itself. The direction that respondent be reinstated from the inactive reserve to duty with the active reserve—that the Air Force be compelled to have a disobedient captain in its ranks—may well be inconsistent with the principles of *Sampson* v. *Murray*, 415 U.S. 61 (1974) (courts ordinarily should not enter injunctions requiring a discharged federal employee to be reinstated), and *Orloff* v. *Willoughby*, 345 U.S. 83 (1953) (courts must be careful to respect military personnel decisions, even those initially based on improper considera-

SUMMARY OF ARGUMENT

I

The military regulation is not unconstitutional. In *Greer* v. *Spock*, 424 U.S. 828 (1976), the Court upheld the constitutionality of an Army regulation that required the "prior written approval" of the base commander before any person could distribute "any publication" on base. *Id.* at 831. The Court concluded (*id.* at 840) that

> [t]here is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.

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tions). Cf. *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971) (certain military personnel matters are not justiciable); *Covington* v. *Anderson*, 487 F.2d 660 (9th Cir. 1973); *Cortright* v. *Resor*, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972). There is also some doubt that respondent exhausted his military remedies; he did not apply to the appropriate Corrections Board, which had the authority to order him retransferred to active duty. Courts have held that this failure bars judicial review. See, *e.g.*, *Diliberti* v. *Brown*, 583 F.2d 950 (7th Cir. 1978); *Seepe* v. *Department of the Navy*, 518 F.2d 760 (6th Cir. 1975). Cf. *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975); *Gusik* v. *Schilder*, 340 U.S. 128 (1950). But some of these problems were not raised in the court of appeals and, in any event, they are not strictly jurisdictional. We have, therefore, elected not to raise them here so that questions concerning the validity of the regulations can be put to rest. Cf. *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 479-480 (1977).

The regulations at issue here are identical in purpose and effect to the regulations challenged in *Greer* v. *Spock* and should be upheld for the same reasons.

The court of appeals distinguished *Greer* on the ground that it involved only restrictions applied to civilians rather than restrictions on the speech of servicemen. The court of appeals also reasoned that *Greer* involved speech for "political purposes" rather than "free speech" (Pet. App. 13a). These distinctions are insubstantial. Political speech is free speech; speech about political matters lies at the core of the First Amendment. *Greer* cannot properly be distinguished on the ground that it involved "only" speech at the core of the constitutional concern. And the observation that this case involves servicemen rather than civilians does not assist the court of appeals. The military's authority over the speech and conduct of servicemen is necessarily far broader than its authority over the speech of civilians. The court of appeals' distinction also overlooks the rationale of *Greer*: that a military base is not a "public forum" for purposes of circulating petitions or making political speeches. No case in this Court has held that a place must be available as a public forum for employees but not for guests, and there is thus no basis for holding that a military base is a "public forum" for servicemen but not for civilians.

II

If the Court agrees with our contention that the regulation is consistent with the Constitution, then

it must reverse the judgment of the court of appeals insofar as that judgment pertains to petitions addressed to persons other than Members of Congress. The court of appeals concluded (Pet. App. 8a), in addition, that the regulation is invalid under 10 U.S.C. 1034, which provides that "[n]o person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." This aspect of the decision of the court of appeals is incorrect for two reasons.

First, the language and history of 10 U.S.C. 1034 indicate that this statute is concerned only with private communications from servicemen to Members of Congress and not with the public circulation of group petitions at military facilities. Because the challenged regulation does not affect any serviceman's personal right to engage in private communications with Members of Congress, there is no inconsistency between the statute and the regulations.

Second, the requirement that servicemen submit petitions to their commanders for approval prior to on-base distribution is essential to forestall the distribution of improper materials *before* they accomplish substantial harm to military discipline, loyalty or morale or adversely effect accomplishment of military missions. The regulation is therefore necessary to the protection of the national security and valid under 10 U.S.C. 1034.

ARGUMENT

I

THE REQUIREMENT THAT SERVICEMEN OBTAIN THE APPROVAL OF THE BASE COMMANDER BEFORE DISTRIBUTING PETITIONS ON BASE DOES NOT VIOLATE THE FIRST AMENDMENT

This case involves two related constitutional issues. The first is whether the military departments may prohibit the distribution of petitions on military bases that would create a "clear danger to the loyalty, discipline, or morale of members of the [base command], or material interference with the accomplishment of a military mission * * *." AFR 35-15(3)(a)(2). See Army Reg. 210-10 ¶ 5-5(c); FMFO 5370.3 § 4(a).[4] The second is whether, in order to

[4] The Army regulation governing the distribution of petitions is essentially identical to the Air Force regulation involved in this case. See *Greer* v. *Spock*, 424 U.S. 828, 831 n.2 (1976). The Navy regulation at issue in *Secretary of the Navy* v. *Huff*, No. 78-599, is more detailed. It allows distribution to be prohibited by the commander where distribution would (FMFO 5370.3 § 4(a)):

> (1) Materially interfere with the safety, operation, command, or control of his unit, or the assigned duties of particular members of the command; or
>
> (2) Present a clear danger to the loyalty, discipline, morale, or safety to personnel of his command; or
>
> (3) Involve distribution of material or the rendering of advice or counsel that causes, attempts to cause, or advocates insubordination, disloyalty, mutiny, refusal of duty, solicits desertion, discloses classified information, or contains obscene or pornographic matter; or
>
> (4) Involve the planning or perpetration of an unlawful act or acts.

enforce such a prohibition, the military departments may require servicemen to submit petitions for review before distribution. It is necessary to undertake both inquiries because respondent never submitted his petition for review, and the court of appeals concluded that the prior submission rule is the unconstitutional feature of the regulation. Yet the prior submission rule obviously cannot stand unless circulation of some of the petitions so submitted properly could be prohibited. We therefore first discuss the scope of the authority of the military departments to prohibit circulation of petitions on military bases.

A. Military Commanders May Prohibit The Distribution On Military Bases Of Petitions That Present A Clear Danger To Military Loyalty, Discipline, Or Morale, Or That Materially Interfere With The Accomplishment Of A Military Mission

1. Greer v. Spock *establishes that distribution of certain materials on military bases may be prohibited*

In *Greer* v. *Spock*, 424 U.S. 828 (1976), the Court upheld the constitutionality of an Army regulation that required the "prior written approval" of the base commander before any person could distribute "any publication" on base. *Id.* at 831. That regulation instructed the base commander to deny permission to distribute written materials if " 'the dissemination * * * presents a clear danger to the loyalty, discipline, or morale of troops at [the] installation * * *.' " *Id.* at 831 n.2. The Court dismissed the contention that this restraint on the distribution of

written materials at military facilities violates the First Amendment (*id.* at 840; footnote omitted):[5]

> The only publications that a military commander may disapprove are those that he finds constitute "a clear danger to [military] loyalty, discipline, or morale," and he "may not prevent distribution of a publication simply because he does not like its contents," or because it "is critical —even unfairly critical—of government policies or officials * * *." There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.

See also *id.* at 841 (Burger, C.J., concurring); *id.* at 848-849 (Powell, J., concurring).

The regulations at issue here are identical in purpose and effect to the regulation upheld in *Greer* v. *Spock*. Both regulations require the approval of the base commander before petitions may be distributed on base, and both prohibit the distribution of written materials that present a "clear danger to the loyalty, discipline or morale" of affected servicemen. See also FMFO 5370.3 § 4(a)(2); note 4, *supra*. Moreover, the considerations that underlay the Court's decision in *Greer* v. *Spock* also are present here.

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[5] Like respondents in this case, the respondents in *Spock* contended that the military regulations created an unconstitutional system of prior restraint and established impermissibly broad standards for deciding what materials may not be distributed. See Brief for Respondents in *Greer* v. *Spock*, No. 74-848, at 36-43.

The military's interest in preserving the loyalty, morale, and discipline of troops is undeniably important.[6] See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. The military is a "specialized community," *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953), with a need to "insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). The nation's security depends on the preservation of military preparedness, loyalty and discipline, for " 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' " *Parker* v. *Levy*, 417 U.S. 733, 743 (1974), quoting *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955).

Accordingly, the Court has recognized that " 'the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty * * *.' " *Parker* v. *Levy*, *supra*, 417 U.S. at 744, quoting *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). In particular,

[6] Congress has made it a punishable offense for any serviceman to engage in "disorders and neglects to the prejudice of good order and discipline * * *." 10 U.S.C. 934. "Within [the military], the accuracy and effect of a superior's command depends critically upon the specific and customary reliability of subordinates, just as the instinctive obedience of subordinates depends upon the unquestioned specific and customary reliability of the superior. The importance of these considerations to the maintenance of a force able and ready to fight effectively renders them undeniably significant to the public role of the military." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 368 (1976).

the extent of a serviceman's right to engage in political activities on a military base is limited by "[t]he fundamental necessity for obedience," *Parker* v. *Levy*, *supra*, 417 U.S. at 758, and the " 'overriding demands of discipline and duty.' " *Id.* at 744.

> The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.

Id. at 759, quoting *United States* v. *Gray*, 20 U.S.C. M.A. 63, 42 C.M.R. 255 (1970). These considerations are no less appropriate here than in *Greer*.

And here, as in *Greer*, the regulations' interference with the right of expression is quite limited and is narrowly constrained to protect the government's substantial interests. The regulations do not prohibit or otherwise interfere with a serviceman's personal communications to Members of Congress or other government officials. The regulations do not restrict a serviceman's freedom to engage in oral discussions of political topics or other issues either off base or on base.[7] The regulations do not affect the distribu-

[7] 18 U.S.C. 2387(a)(1), however, makes it unlawful for any person, "with intent to interfere with, impair or influence the loyalty, morale, or discipline of the military or naval forces of the United States" to advise, counsel or urge "insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States * * *."

tion of petitions off base in the United States by servicemen not in uniform.[8] The regulation addresses only the distribution of written materials and the "public solicitation or collection of signatures" on a petition at military facilities. AFR 30-1(9), 35-15(3)(a)(1). The activities dealt with by the regulation thus are a small subset of the types of expression in which a serviceman might engage. And there is "no generalized constitutional right to make political speeches or distribute leaflets" on a military base, *Greer* v. *Spock*, *supra*, 424 U.S. at 838, because the purpose of a military facility is to provide for the national defense, "not to provide a public forum." *Ibid.* See also *United States* v. *Mowat*, 582 F.2d 1194, 1205 (9th Cir. 1978).

[8] The Navy regulation challenged in *Secretary of the Navy* v. *Huff*, *supra*, is even more limited in effect. It applies only to the distribution of written materials at an installation by a serviceman while "on duty or in uniform * * *." FMFO 5370.3 § 3(b).

The Navy and Air Force regulations also apply to the off base distribution of petitions "anywhere within a foreign country irrespective of uniform or duty status." *Ibid.*; see AFR 30-1(9). This portion of the Navy regulation was upheld by the district court in *Secretary of the Navy* v. *Huff* (78-599 Pet. App. 48a-50a) as applied to a United States base in Japan. The court concluded that the restriction was an appropriate means of enforcing Article XVI of the Treaty of Mutual Cooperation and Security with Japan, 11 U.S.T. 1664, T.I.A.S. No. 4509, which prohibits servicemen from engaging in political activity in Japan (78-599 Pet. App. 49a-50a). Accord, *Culver* v. *Secretary of the Air Force*, 559 F.2d 622, 632 (D.C. Cir. 1977). This portion of the judgment in *Huff* was not appealed and is thus no longer at issue in that case. The application of the challenged Air Force regulation to off base foreign distribution was not challenged by respondent.

The regulation is limited not only in its scope but also in its substantive effect. The grounds on which distribution may be disapproved by base commanders are narrowly tailored to reflect precisely the substantial interests the government seeks to protect. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-112 (1972). By prohibiting the distribution of petitions that create a "clear danger to [military] loyalty, discipline, or morale * * * or material interference to the accomplishment of a military mission," AFR 35-15(3)(a)(2), the regulations "'preserve the property under [military] control for the use to which it is lawfully dedicated.'" *Greer* v. *Spock*, *supra*, 424 U.S. at 836, quoting *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966). See also *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 120-121; *Cox* v. *Louisiana*, 379 U.S. 559, 565 (1965). The terms employed in the regulations are sufficiently distinct, in light of military custom and usage, to be understood and fairly applied.[9] *Parker* v. *Levy*, *supra*,

[9] In *Parker* v. *Levy* the Court determined that the provision in 10 U.S.C. 934 that proscribes "all disorders and neglects to the prejudice of good order and discipline" is not unconstitutionally vague or overbroad. 417 U.S. at 752-762. The Court noted that because of "the reasons which differentiate military society from civilian society, * * * Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed * * *." *Id.* at 756. The Court also emphasized that the meaning of restrictions to protect discipline and good order has gained content from "official interpretation by authoritative military sources [as well as] by less formalized custom and usage." 417 U.S. at 754. For example, in *United States* v. *Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972), the Court of Military Appeals, in upholding a court martial con-

417 U.S. at 752-757. See *Grayned* v. *City of Rockford, supra,* 408 U.S. at 112; *Cameron* v. *Johnson,* 390 U.S. 611 (1968). The restriction on the distribution of petitions involves " 'conduct and not merely speech,' " and it applies to a " 'range of easily identifiable and constitutionally proscribable * * * conduct.' " [10] *Parker* v. *Levy, supra,* 417 U.S. at 760, quoting *CSC* v. *National Association of Letter Carriers,* 413 U.S. 548, 580-581 (1973). The scope of potential prohibition is not facially invalid merely because "there may lurk at the fringes" conduct that

viction under 10 U.S.C. 934 for the distribution of a petition that injured "good order and discipline," stated that because of "our national reluctance to inhibit free expression * * * the connection between the statements or publications involved and their effect on military discipline [must] be closely examined." 45 C.M.R. at 344. The court concluded that the question in such a case is whether "the words used are used in such circumstances and are of such a nature as to create a clear and present danger" (*ibid.,* quoting *Schenck* v. *United States,* 249 U.S. 47, 52 (1919) (Holmes, J.)) of injuring the military interest in order and discipline or "the effectiveness of response to command" (*ibid.,* quoting *United States* v. *Gray, supra*).

[10] Because respondent did not submit his petition to the Air Force for approval prior to distribution (Pet. App. 18a-19a), he can not contend that the substantive limitations on distribution are unconstitutional as applied to his petitions. See *Greer* v. *Spock, supra,* 424 U.S. at 840. Respondent's claim is (and must be) that the regulations are invalid as applied to every conceivable petition. See also note 11, *infra.*

The Navy conceded that its regulation was improperly applied to restrict distribution of certain petitions in *Huff* (78-599 Pet. App. 3a). The regulations were quite plainly applied properly, however, in *Carlson* v. *Schlesinger,* 511 F.2d 1327 (D.C. Cir. 1975); *Schneider* v. *Laird,* 453 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972); and other of the petitions involved in both *Huff* and *Allen* v. *Monger, supra.*

is not properly subject to restraint.[11] *Parker* v. *Levy, supra,* 417 U.S. at 760.

[11] See note 9, *supra.* The court of appeals erred in stating that the regulations are overbroad because they allow the commander "to prohibit distribution partly because the 'material is critical of Government policies or officials.' AFR 35-15(3)(a)(4)" (Pet. App. 13a). This portion of the regulation is in fact designed to ensure that any decision to prohibit distribution is based on considerations *other than* the petition's criticism of government policy. See *Greer* v. *Spock, supra,* 424 U.S. at 840.

The court of appeals also erred in suggesting that the "regulations are valid, if at all, only in the limited setting of a combat zone" (Pet. App. 13a). To be sure, what may constitute a "clear danger" to discipline and loyalty or what may threaten a military mission may vary from circumstance to circumstance. A commander may view even minor disruptions in discipline as dangerous to his command in a combat situation, while greater lapses may be tolerable (*i.e.,* not clearly dangerous) at other times and places. But the military interest that is defined by the regulation—avoiding a "clear danger" to military discipline, morale and loyalty—is of equivalent importance in both situations, even though the acts necessary to present the danger may be different. The military must be prepared for immediate action. See *United States ex rel. Toth* v. *Quarles, supra,* 350 U.S. at 17. History teaches vividly that the readiness of the armed forces to respond instantly and without internal division when the need occasions is of the utmost importance to our national security whether we are in a state of perceived peace or in a state of declared war. See also pages 44-45, *infra.*

Because this case involves a challenge to the regulations on their faces, the Court must sustain them if *anything* that might have been written and circulated in Guam in 1974—or in a combat-ready missile base in North Dakota in 1980—could possibly present a clear danger to military readiness. It is not hard to understand the need for readiness at a missile base whose function calls for instantaneous response (if necessary); that alone is enough to show the court of appeals' error.

The need for readiness is demonstrated in an affidavit sub-

2. Greer *applies to military personnel as well as to civilians on military bases*

The court of appeals concluded that *Greer* is not controlling here. The court reasoned that *Greer* v. *Spock* involved only the right of civilians to "come on the base * * * for political purposes," and this case

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mitted by the commander of the Iwakuni Air Station in *Secretary of the Navy* v. *Huff, supra* (78-599 Pet. App. 29a). The base took part in combat and relief activities conducted throughout Southeast Asia in 1972 and 1975. The affidavit notes (*ibid.*):

> At any time, the Wing may again be called upon to deploy under similar circumstances on a moment's notice. In this eventuality, the highest degree of loyalty, discipline, and morale will be necessary for the successful completion of the mission.
>
> Personnel who are constantly prepared for deployment into combat or a crisis situation must at all times have the same strict discipline and high morale as would troops in actual combat situations. * * * The highest standards of mental, physical, moral discipline, and morale of all members of the Command are central to combat readiness and effectiveness. * * * These traits must be inherent in each Marine before he goes into combat and not a learning process reserved for the actual battlefield. Individual or collective efforts by those who would attempt, consciously or otherwise, to undermine good order, discipline, loyalty, and morale, cannot be tolerated.

Recognizing the scope of the military need for preparedness, discipline and morale, other courts have upheld the military prior approval regulations as applied to a Vietnam combat base, *Carlson* v. *Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975), a weapons testing ground in Utah, *Schneider* v. *Laird*, 453 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972), and an Army base in South Carolina, *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971).

presents the different question of the right of military personnel to be free of "direct restraints upon * * * free speech" (Pet. App. 13a). The distinction offered by the court of appeals lacks any substance.[12]

The fact that this case concerns servicemen rather than civilians does not undermine the government's substantial interest in prohibiting the distribution of petitions that present a clear danger to military dis-

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[12] In *Secretary of the Navy* v. *Huff, supra*, the District of Columbia Circuit reasoned that *Greer* v. *Spock* concerned the distribution of pamphlets and leaflets rather than petitions, and thus may not apply to restraints on petitioning activities (78-599 Pet. App. 20a). This proposed distinction also is unsupportable, for several reasons.

First, the regulation upheld in *Greer* v. *Spock* applied to the distributions of "handbills, flyers, circulars, pamphlets or other writings" as well as "any publication." 424 U.S. at 831. It was thus plainly broad enough to encompass petitions. Second, a threat to military order and preparedness can be couched in the form of a petition as well as in the form of leaflets or other writings. There is thus no basis for differentiating the military interest on the basis of the form of the document being distributed. Third, the regulation was applied in *Spock* to prohibit the presidential campaigning of a private citizen—an activity that is unquestionably as integral to the political process as the petitions involved in this case. If a base is not a public forum for one purpose, it is not a public forum for the other. Finally, the Court has noted in *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 222 (1967), and *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945), that the right to assemble peaceably and petition for a redress of grievances is intimately connected with the right of free speech and is subject to regulation under the same standards. The analysis of the constitutionality of the challenged regulations is thus not affected by the fact that petitions, rather than political leaflets, are at issue here. See *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 5-7 (1964); *Talley* v. *California*, 362 U.S. 60 (1960).

cipline and preparedness. To the contrary, the authority of the military departments to limit conduct at military facilities that erodes discipline and order is even more firmly based as to servicemen than as to civilians. *E.g.*, *Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 757. This is true not only because of the special requirements of discipline and duty in military life, *e.g.*, *Parker* v. *Levy*, *supra*, 417 U.S. at 743, 744, but also because servicemen are analogous to government employees and thus may be subjected to reasonable restrictions on free expression in order to promote effective government. See *CSC* v. *National Association of Letter Carriers*, 413 U.S. 548, 564-565 (1973); cf. *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Kelley* v. *Johnson*, 425 U.S. 238, 245 (1976). Moreover, the vital governmental interest recognized in *Greer* v. *Spock*—to avert threats to military loyalty, discipline and morale (424 U.S. at 840)—can be injured by the actions of military personnel as well as by civilians. There is thus no basis for interpreting that decision to permit regulation only of civilians, and not of servicemen.

It is not possible to distinguish *Greer* v. *Spock* on the theory that it concerned only the right to "come on the base * * * for political purposes" rather than "the right of free speech" (Pet. App. 13a). The right of free speech was, of course, directly at issue in *Greer* v. *Spock*. See 424 U.S. at 836-840. The rationale for the Court's holding in *Greer* was that a military base is not a "public forum," *i.e.*, not a place for open speech and public debate. One reason why a military base is not a public forum is the need to

remove the military from politics, which is one form of free speech. But this hardly exhausts the reasons why a base is not a public forum,[13] and it certainly does not support the court of appeals' distinction between political speech and "free speech."

In *Greer*, as in numerous related cases (*e.g.*, *Grayned* v. *City of Rockford*, *supra*; *Adderley* v. *Florida*, *supra*; *Cox* v. *Louisiana*, *supra*), it was necessary to determine whether a government could declare a particular publicly owned facility off-limits to activity that substantially interferes with the purposes of the facility. In determining in such cases that regulation may "preserve the property under its control for the use to which it is lawfully dedicated," *Adderley* v. *Florida*, *supra*, 385 U.S. at 47, the Court has not limited its decisions to persons who enter the facility as guests rather than as employees. For example, it is inconceivable that the Court would have reached a different result in *Grayned* v. *City of Rockford* if the demonstrators who were disturbing classroom activities at school were teachers rather than "students, their family members and friends." 408 U.S. at 105. It is similarly inconceivable that the

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[13] The special need for military order and discipline is the principal reason why military bases are not public forums, even though public parks and "company towns" are available as forums. Compare *Greer* v. *Spock*, *supra*, 424 U.S. at 836-838, with *Hague* v. *CIO*, 307 U.S. 496, 515-516 (1939) (Roberts, J., concurring). Compare *Marsh* v. *Alabama*, 326 U.S. 501 (1946), with *Hudgens* v. *NLRB*, 424 U.S. 507 (1976). See generally Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233; Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1.

constitutional analysis in *Adderley* v. *Florida* would have been any different if the persons demonstrating on jail grounds against racially invidious practices were jail personnel rather than students from a nearby college. 385 U.S. at 40. There is thus no basis for limiting the decision in *Greer* to civilians "who come on the base * * * for political purposes."

B. The Requirement That Servicemen Obtain The Approval Of Their Commanders Before Distributing Petitions On Base Is Constitutional

1. *The Court has permitted systems of prior approval to be used concerning speech in military bases*

As we have outlined above, the Court concluded in *Greer* v. *Spock* that military bases are not public forums. It follows from this that all on-base circulation of petitions could be forbidden. If the military services choose to relax this rule—to give servicemen greater freedom of expression than the Constitution requires—they surely can require advance submission of proposed petitions to ensure that their content is consistent with the purpose for which the liberty is granted. And military commanders can use this advance screening to select some petitions for proscription. If, as the Court held in *Lenman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), ordinary political speech can be excluded (after advance inspection) from a transit system that is not a public forum, then speech dangerous to the military can be excluded (after advance inspection) from a base that is not a public forum.

It may be, however, that *Greer* stands for the proposition that a military base is a public forum for some purposes but not for others. In that event, the prior approval requirement must be assessed under the rules that apply to limited-access forums. There are many systems of prior approval for the use of different public forums. For example, it may be necessary to obtain a permit to hold a rally in a park, to obtain a license for a parade, or to obtain a booking to play in a theatre owned by the public. None of these facilities is open to everyone at all times. All involve prior scrutiny of the speech in question. The Court has said that such systems of scrutiny may be used when "the exercise of such authority [is] bounded by precise and clear standards." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975).

The regulations in question here provide the necessary "precise and clear" standards for the use of the base as a public forum. They spell out quite clearly the duty of the base commander: he is to approve the distribution *unless* the material would create a "clear danger to the loyalty, discipline, or morale" of servicemen. If there is such a danger, and the commander exercises his authority to prohibit the distribution, he must notify higher authority immediately. The commander is under instruction that he cannot ban distribution "solely on the ground that the material is critical of Government policies or officials." This guidance is enough, we submit, to sustain the regulation even under the

standards that have been applied to prior approval rules for public parks—places in which the freedom to speak traditionally has been much greater than that afforded on military bases.

Indeed, *Greer* v. *Spock* itself demonstrates the validity of the prior approval rule. Respondents in *Greer* contended that the prior approval requirement of the regulations for Fort Dix created an unconstitutional prior restraint. The Court rejected that contention and upheld the regulations, which required the "prior written approval" of the base commander before "any publication, including newspaper, magazines, handbills, flyers, circulars, pamphlets or other writings" could be distributed on base. 424 U.S. at 831 & n.2, 840. Similar regulations for other bases have been sustained by other federal courts. See, *e.g.*, *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971); *Yahr* v. *Resor*, 431 F.2d 690 (4th Cir. 1970), cert. denied, 401 U.S. 982 (1971); *Noland* v. *Irby*, 341 F. Supp. 818 (W.D. Ky. 1971), aff'd *sub nom. Noland* v. *Desobry*, No. 71-1661 (6th Cir. Apr. 24, 1972), cert. denied, 409 U.S. 934 (1972); *Schneider* v. *Laird*, 453 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972); *Carlson* v. *Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975).

2. *Prior submission and approval rules are constitutional under principles long accepted for speech in general*

The discussion above is enough to sustain the regulations. But if we are wrong in this submission, then

the Court must consider whether the regulation is, as the court of appeals said, "obviously a prior restraint on speech" (Pet. App. 11a). We submit that it is not. In only the most narrow sense is speech restrained by the prior approval requirement. The regulation does not, as in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), or *Near* v. *Minnesota*, 283 U.S. 697 (1931), wholly suppress the communication of any particular information. Instead, the right of every serviceman to express his views on any subject either orally on the base or in writing by individual letters or distributing petitions off base is unaffected by this regulation.[14] The prior approval requirement acts to limit the "time, place and manner" of public communications.[15] The Court has held that such restrictions are permissible where —as here—they are designed to protect substantial governmental interests. See, *e.g.*, *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748-750 (1978) (restrictions on broadcast of indecent speech); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 & n.18 (1976) (plurality opinion) (zoning limitation on the location of "adult" film theatres is supported by the city's interests in commercial planning and is

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[14] The special restrictions on the distribution of petitions off base in foreign countries are not at issue in this case or in *Secretary of the Navy* v. *Huff*, *supra*. See note 8, *supra*.

[15] This is emphasized in the Navy regulation challenged in *Secretary of the Navy* v. *Huff*, *supra*. That regulation requires prior approval for on-base distributions only if the petition (or other writing) is to be distributed during duty hours or in work areas. FMFO 5370.3 § 3(b).

not invalid as a prior restraint on speech); *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 118-119.

Moreover, even to the extent that the prior approval requirement affects petitioning activities, it can be expected to occasion only a temporary delay in the distribution of most materials. The prior approval requirement serves only as a temporary screening device to identify improper materials and prohibit their on-base distribution before they endanger the loyalty, discipline and preparedness of the command. See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. Cf. *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (approving prior review and licensing of motion pictures); *Times Film Corp.* v. *Chicago*, 365 U.S. 43 (1961) (same).[16]

The court of appeals was mistaken in concluding that "less restrictive alternatives" are available to protect the government's substantial interests (Pet. App. 12a) and that the government therefore cannot satisfy the "heav[y] burden of justification" for the prior approval requirement (*id.* at 11a). The alternatives identified by the court were "[p]unishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty

[16] Respondent has not contended that the prior approval requirement fails to afford a prompt determination of a request for on-base distribution. See *Freedman* v. *Maryland*, *supra*, 380 U.S. at 58-59 (film licensing). The issue is not properly presented here because respondent did not apply for approval before distributing his petition (see Pet. App. 3a-4a). Nor has this issue been raised in *Secretary of the Navy* v. *Huff*, *supra*.

periods, and protection from pressure by superiors who are seeking signatures * * *" (*id.* at 11a-12a). Although these options are less "restrictive," the court of appeals offered no argument showing that they would be adequate to avoid or "mitigate the effects" of an improper distribution.[17] *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 562 (1976).

Punishment after the fact would not safeguard the national interest that underlies the military regulation. The injury to national security occurs when the improper material is distributed and discipline and morale are lowered, or the military mission is threatened. See note 11, *supra*. We do not dispute that, in some circumstances, the prospect of punishment after the fact would discourage servicemen from engaging in improper activity. In at least two circumstances, however, a system of post hoc sanctions would be inadequate unless supplemented by a requirement of prior approval: (1) where a serviceman innocently but incorrectly concludes, without review by the base commander, that the materials are proper for distribution; and (2) where a serviceman determines, despite threatened post-distribution sanctions, to distribute improper materials. The prior approval requirement responds to both of these concerns: (1) it permits the military commander to identify and prohibit distribution of improper materials before any

[17] Punishment after the fact for the exhibition of obscene movies in a theatre obviously is an alternative to a pre-exhibition licensing requirement. The Court nonetheless has upheld licensing of movies. See page 32, *supra*.

distribution occurs; and (2) it permits immediate action to curtail distribution where approval has been denied or has not been sought. By thus preventing the distribution of improper materials before they can accomplish substantial harm, the prior approval requirement is necessary to the accomplishment of the objectives of the regulation. See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. Cf. *Times Film Corp.* v. *Chicago*, *supra*, 365 U.S. at 49-50.

Similarly, limiting the prior approval requirement to distributions in work areas or during duty hours (Pet. App. 11a) would be less restrictive, but it would not provide adequate protection for the government's substantial interests. Military effectiveness may be severely impaired whether on-base distributions occur in work areas on duty or in the barracks after hours.[18] In either situation, the Constitution does not "disable[] a military commander" from requiring servicemen to submit petitions for approval prior to distribution on base and "disapprov[ing the circulation of petitions] that he finds constitute 'a clear danger to [military] loyalty, discipline, or morale' * * *." *Greer* v. *Spock*, *supra*, 424 U.S. at 840.

[18] The Navy regulations challenged in *Secretary of the Navy* v. *Huff*, *supra*, permit on-base distribution without prior approval in non-work areas during off-duty hours. FMFO 5730.3 § 3(b). The regulation requires, however, that prior approval be obtained before any distribution is made on a naval vessel or aircraft. *Ibid.*

The Army regulation is similar to the Air Force regulation in requiring prior approval for any on-base distribution, regardless of base area or duty status. See *Greer* v. *Spock*, *supra*, 424 U.S. at 831.

Off-base distributions are presumably less dangerous to military loyalty, discipline or morale for the simple reason that what occurs off base lacks any imprimatur of official sanction and is less likely to create any general or widespread disruption among base personnel. The regulations thus generally do not require servicemen out of uniform to obtain prior approval before circulating petitions off base in the United States.

In determining the permissibility of official restraints on the circulation of written materials in federal facilities such as jails and prisons, the Court has observed that the restriction should be upheld if it "further[s] an important or substantial governmental interest unrelated to the suppression of expression [and is] no greater than necessary or essential to the protection of the particular governmental interest involved." *Procunier* v. *Martinez*, 416 U.S. 396, 413 (1974). See also *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 29-31 (pretrial detainees). The challenged regulations satisfy these criteria. The military regulations are designed to preserve the ability of the armed forces to perform their essential functions and not to suppress speech. *Greer* v. *Spock*, *supra*, 424 U.S. at 840. The prior approval requirement is no broader than necessary to accomplish the objectives of the regulation: it is inapplicable to individual written communications, to off base distributions of petitions out of uniform, and to oral communications either on or off base.

II

THE REQUIREMENT THAT SERVICEMEN OBTAIN THE APPROVAL OF THE BASE COMMANDER BEFORE DISTRIBUTING PETITIONS TO MEMBERS OF CONGRESS ON BASE DOES NOT VIOLATE 10 U.S.C. 1034

If the Court agrees with our contention that the regulation is consistent with the Constitution, then it must reverse the judgment of the court of appeals insofar as that judgment pertains to petitions addressed to persons other than Members of Congress. Petitions addressed to Members of Congress require resolution of the meaning of 10 U.S.C. 1034, which provides that "[n]o person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." The court of appeals held that the requirement that servicemen obtain approval before distributing petitions on base is not "actually necessary to the national security outside of a combat zone" (Pet. App. 8a). The court concluded that the challenged regulation is therefore invalid under 10 U.S.C. 1034.[19] This aspect of the decision of the court of appeals is incorrect for two reasons.

[19] The court did not specify whether it was holding the regulation to be facially invalid under 10 U.S.C. 1034 or simply invalid as applied to respondent's conduct on Guam (see Pet. App. 8a). But it affirmed a declaratory judgment that the entire regulation is "null, void and inoperative" (A. 37). In *Secretary of the Navy* v. *Huff*, *supra*, the District of Columbia Circuit held the prior approval requirement invalid under 10 U.S.C. 1034 as applied to servicemen stationed at the United States Naval Air Base in Iwakuni, Japan (78-599 Pet. App. 16a). In *Brown* v. *Allen*, *supra*, the Ninth Circuit held that 10 U.S.C. 1034 barred application of the prior approval requirement to servicemen on board Navy ships (78-1005 Pet. App. 2a-4a, 11a-12a).

A. 10 U.S.C. 1034 Does Not Limit The Authority Of The Military Departments To Regulate The Distribution Of Petitions On Military Bases

The language and history of 10 U.S.C. 1034 indicate that this statute is concerned only with private communications from servicemen to Members of Congress and not with the public circulation of group petitions. Because the challenged regulation does not affect any serviceman's personal right to engage in private communications with Members of Congress, there is no inconsistency between the statute and the regulation.

"The starting point in every case involving construction of a statute is the language itself." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976), quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). The language of 10 U.S.C. 1034 does not mention joint petitioning or other collective activity. It deals instead with the action of an individual "member of an armed force in communicating with a member of Congress * * *." The absence of any reference to group petitioning in this statute is not simply fortuitous; it reflects the limited objective that Congress sought to achieve.

10 U.S.C. 1034 was enacted in response to an incident involving a constituent of Rep. Byrnes of Wisconsin. In 1951 Rep. Byrnes learned that a sailor on board a Navy ship had been threatened with a court martial if he wrote a letter to his congressman without sending it through the military chain of command. 97 Cong. Rec. 3776 (1951). At that time, Articles 1248 and 1249 of Navy Regulations (1948) provided that "any letter from a member of the naval service to Congress or to a Congressman which affects the Naval Establishment should be sent through official channels." 97 Cong. Rec. 3776 (1951). The Navy informed Rep. Byrnes that "[w]henever correspondence addressed to a Congressman is sent via the Secretary of the Navy, it is, as a matter of policy, forwarded promptly." *Ibid.* According to the Navy, the purpose of the requirement was not to prevent the delivery of letters to Congressmen but to keep the Navy "advised as to all matters relating to the Naval Establishment." *Ibid.*

Rep. Byrnes proposed the bill that became 10 U.S.C. 1034 as a means to remove the Navy's restriction on a serviceman's individual communications with Members of Congress.[20] In proposing this legislation, he agreed with Rep. Vinson that its purpose was "to permit any man who is inducted to sit down and take a pencil and paper and write to his Congressman or Senator." 97 Cong. Rec. 3776 (1951). As Congressman Vinson summarized on the House floor, the objective of Section 1034 is (*id.* at 3877)

> to let every man in the armed services have the privilege of writing his Congressman or Senator on any subject if it does not violate the law or if it does not deal with some secret matter.

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[20] The Army and the Air Force did not require servicemen to send letters to Members of Congress through official channels. 97 Cong. Rec. 3776-3777 (1951).

The original version of the amendment provided:

> No person shall be inducted for training and service under this title into any branch of the Armed Forces which restricts or limits the rights of its members to communicate directly with Members of Congress unless such communication is in violation of regulations necessary to the security and safety of the Armed Forces.

97 Cong. Rec. 3775-3776 (1951). Rep. Vinson pointed out "that there is no induction in the Navy." *Id.* at 3776. The next day Reps. Byrnes and Vinson therefore introduced a substitute version of the amendment, corrected to remove its drafting defect. The new amendment, as enacted, read (*id.* at 3883):

> No member of the Armed Forces shall be restricted or prevented from communicating directly or indirectly with any Member or Members of Congress concerning any subject unless such communication is in violation of law, or in violation of regulations necessary to the security and safety of the United States.

In *Allen* v. *Monger, supra*, 583 F.2d at 441, the Ninth Circuit suggested that the phrase "communicate directly or indirectly" in the original law indicates that group petitions should be included within the term "communication." The phrase "directly or indirectly" was deleted as surplusage in a 1956 codification of this section. 583 F.2d at 441. In determining whether the term "communication" refers to the action on an individual serviceman, or to group activity, however, the phrase "directly or indirectly" is unimportant. If a group petition is a "communication" by a serviceman within the meaning of the statute, it would seem a "direct" rather than "indirect" form of expression.

Throughout the legislative history, the focus of Congress' concern was on removing official restraints on the personal communications of individual servicemen to Members of Congress. Group action—as in distributing petitions on military facilities—is never mentioned even obliquely. The absence of any reference to group petitioning in the language or legislative history of this statute is especially significant because, in its enactment of analogous legislation, Congress has been careful to refer to both individual and collective activity. For example, 5 U.S.C. 7102 provides that "[t]he right of [civil service] employees, individually or collectively, to petition Congress or a Member of Congress * * * may not be interfered with or denied."

As Judge Tamm concluded in his dissent in *Secretary of the Navy* v. *Huff*, *supra*, "[a]n objective reading of the legislative history demonstrates that the *sole* purpose in enacting 10 U.S.C. § 1034 was to ensure that an *individual* member of the military could, at any time, write to his senators or representative without being required to have the communication proceed through command channels" (78-599 Pet. App. 24a; emphasis in original).[21] This

[21] In *Huff* the District of Columbia Circuit conceded that the legislative history discusses only the right of individual servicemen to send letter to Members of Congress (78-599 Pet. App. 11a-12a). The court concluded, however, that "there is no indication that this is the outer limit of the communication which Congress sought to protect in passing this legislation" (*id.* at 12a). This analysis is difficult to credit. In determining the "outer limit," or proper meaning, of words employed in a statute, it is always appropriate to be guided by clear evidence of the limited concern that motivated its enactment. The legislative history of 10 U.S.C. 1034 establishes that the concern of Congress is accurately captured by the words of a statute that deals with the action of "a member" of the service in "communicating" with Congress, not with the action of "members" in circulating petitions to the public on a base.

In determining that the "outer limit" of the statute extends beyond its language to joint petitioning, the court of appeals in *Huff* relied solely on a Department of Defense directive (78-599 Pet. App. 12a). The Directive, however, casts no light on this issue. It states only that a serviceman "may petition or present any grievance to any member of Congress" (*ibid.*). The court found significance in the use of the word "petition" in the Directive, concluding that this implies group activity (*ibid.*). But the Department of Defense has never interpreted its Directive in this way—as the regulations at issue demonstrate. Judge Tamm pointed out in his dissent in *Huff* that a petition "can be signed either by one person or by many persons," and the context of the Directive indicates that the singular sense is intended (*id.* at 25a n.1). At all events, the Directive is no substitute for statutory language or legislative history indicating coverage of group petitioning activity.

understanding of the limited scope of 10 U.S.C. 1034 also is supported by good sense. It was reasonable for Congress to have protected communications by individual servicemen without at the same time impairing the military's authority to control group activity on military bases. An individual serviceman may communicate his personal grievances to Congress without disrupting normal base or shipboard activities. When that serviceman attempts to gather support for his grievance by circulating a petition on base, however, there is an inevitable potential that

factions will be created, morale lowered and discontent spread—with the result that the discipline and fighting capacity of the military is injured.

B. The Prior Approval Requirement Is "Necessary To The Security Of The United States" And Thus Valid Even If 10 U.S.C. 1034 Applies To The Distribution Of Petitions On Military Bases

Even if 10 U.S.C. 1034 applies to group petitioning activity on military bases, it does not invalidate regulations that are "necessary to the security of the United States." In concluding that the prior approval requirement of the challenged regulation is not "actually necessary to the national security outside of a combat zone" (Pet. App. 8a), the court of appeals did not purport to hold that a screening of petitions prior to distribution would not *contribute* to national security. Here, as in *Huff* (see 78-599 Pet. App. 16a), the court accepted the explanation of military authorities that screening such petitions would promote order and discipline.[22] Moreover, the court did not dispute that military discipline and preparedness is significantly related to the security of the nation. See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. Instead, the court of appeals concluded (quoting *Huff*, *supra*, 78-599 Pet. App. 16a) that "the

[22] In *Huff* the court of appeals recognized "that order and discipline might be more tightly maintained were commanders given the opportunity to screen petitions prior to their circulation * * *" (78-599 Pet. App. 16a). In this case the Ninth Circuit also conceded that "prior restraints on petitioning may promote some military objectives * * *" (Pet. App. 8a).

national security can [not] be said to require that the objective of military discipline be pursued to the exclusion of all other interests" (Pet. App. 9a). The court also relied (Pet. App. 7a) on its prior decision in *Allen* v. *Monger*, *supra*, where it concluded that the prior approval requirement is not necessary to security because "less restrictive alternatives" (78-1005 Pet. App. 11a-12a)—such as post-distribution punishment of servicemen who distribute improper petitions—are adequate to protect the valid military interests.[23]

There are two critical assumptions underlying the analysis of the court of appeals. First, that in enacting 10 U.S.C. 1034 Congress decided to tolerate activity (outside of a combat zone) that endangers military discipline, loyalty and morale, or interferes with military preparedness, in order to provide an unrestricted right to petition. Second, that military discipline, loyalty, morale and preparedness can, in any event, be maintained by punishment imposed after the distribution of improper materials. These assumptions do not withstand analysis.

1. There is no support in the legislative history of Section 1034 for the court of appeals' assumption that Congress sought to protect on-base petitioning at the expense of military discipline and preparedness. In enacting this provision, Congress did not repeal 10 U.S.C. 934, which authorizes punishment in courts martial for "all disorders and neglects to

[23] The District of Columbia Circuit relied on this same analysis in *Huff* (see 78-599 Pet. App. 17a).

the prejudice of good order and discipline in the armed forces * * *." [24] Petitioning activity on military bases that constitutes a "disorder[] * * * to the prejudice of good order and discipline" is "unlawful" and thus subject to restriction under the express terms of 10 U.S.C. 1034. The prior approval rule serves to arrest unlawful petitioning before it can occur. Moreover, it has always been recognized that military preparedness, and thus the security of the nation, depends on military loyalty, discipline and order. *E.g.*, *Greer* v. *Spock*, *supra*, 424 U.S. at 840; *Parker* v. *Levy*, *supra*, 417 U.S. at 744; *Burns* v. *Wilson*, *supra*, 346 U.S. at 140. It is difficult to imagine how a nation could defend itself without loyal and disciplined soldiers. Regulations designed to avert action on military bases or on military ships or aircraft that clearly endangers discipline, loyalty, and the effectiveness of the armed forces are therefore necessary to the national security.

The court of appeals held that only in a "combat zone" do the demands of discipline and loyalty justify regulatory restrictions on petitioning. There is no basis for so restricting the recognition of the substantial military concerns. The need to avert clear danger to military discipline and preparedness is imperative whether we are in a state of perceived peace or in a state of declared war. A missile base in North Dakota, or a strategic bomber squadron in Maine,

[24] 10 U.S.C. 934 was upheld in *Parker* v. *Levy*, *supra*, against a contention that it violated the First Amendment. See also *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974).

must be prepared today to act within minutes of receiving an alert. It is unrealistic to suggest that our nation's security does not require a prepared, loyal and disciplined fighting force outside of a combat zone. One of the most essential purposes of maintaining an effective military is to discourage other nations from initiating combat with the United States. This interest obviously cannot be achieved if discipline and readiness cannot be enforced until combat is already underway. Moreover, an effective fighting force cannot be trained on the eve of combat or during battle (Affidavit of Lt. Gen. Leslie E. Brown in *Secretary of the Navy* v. *Huff*, 78-599 Pet. App. 62a-63a):[25]

> The highest standards of mental, physical, moral discipline, and morale of all members of the Command are central to combat readiness and effectiveness. * * * These traits must be inherent in each Marine before he goes into combat and not a learning process reserved for the actual battlefield.

The court of appeals gave insufficient weight to the evaluation made by the military officials in determining whether regulatory restrictions that protect military discipline and preparedness are neces-

[25] These concerns are especially significant at a combat-ready advance base located on the periphery of our defense, such as the Guam Air Force Base or the Iwakuni Naval Air Station. See *Huff*, *supra*, 78-599 Pet. App. 27a-30a (Tamm, J., dissenting).

sary to the national securtiy.[26] See *Parker* v. *Levy*, *supra*, 417 U.S. at 758-759; *Orloff* v. *Willoughby*, *supra*, 345 U.S. at 94. The determination of the military authorities that materials that clearly endanger discipline, loyalty or morale, or interfere with the accomplishment of the military mission, should be restricted to protect our national security is based "in reasoned policy, rather than capriciousness," *Culver* v. *Secretary of the Air Force*, 559 F.2d 622, 633 (D.C. Cir. 1977) (Leventhal, J., concurring). It should not have been rejected where, as here, there is nothing to suggest that these substantial concerns are groundless.

The court of appeals simply engaged in hyperbole when it suggested that the question presented here is whether national security requires that "the objective of military discipline be pursued to the exclusion of all other interests" (Pet. App. 9a). A base commander will withhold approval of the distribution of petitions only where they present a "clear danger" to military discipline, loyalty and order. The ability

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[26] Although the reasoning of the court of appeals is not clear in this regard, it is possible that it understood 10 U.S.C. 1034 to require the military to show that a regulation is indispensable to national security to be sustained. But the requirement in 10 U.S.C. 1034 that a regulation be "necessary" to national security cannot mean that, but for the regulation, the nation soon would be conquered. No regulation could meet that standard. If Section 1034 were so construed, the statute would constitute what it purports not to be—an absolute prohibition against restraints on petitions.

of a serviceman to distribute a petition off-base, or to discuss political topics on base, is unimpaired. See note 8, *supra*. The regulatory restriction is designed to protect only the most substantial of the government's valid concerns. It does not suppress speech or exalt discipline "to the exclusion of all other interests." [27]

2. The court of appeals' assumption that punishment after the fact would prevent the distribution of unlawful communications [28] and safeguard the national security interest that underlies this regulation is unsupported. As we discussed in connection with the same "less restrictive alternative" argument concerning the constitutional contentions, the injury to national security occurs when the improper material is distributed and discipline and morale are lowered, or the military mission is threatened. A system of post-distribution sanctions cannot ensure the constant readiness of the military to take effective action in the national defense. For the reasons elaborated

---

[27] DOD Dir. 1325.6 ¶ II also makes it clear that the military regulations are designed to strike a balance between "the serviceman's right of expression * * * and the national security."

[28] The distribution of petitions that prejudice discipline and good order is unlawful under 10 U.S.C. 934. See *United States* v. *Priest*, *supra*. The Navy regulation invalidated in *Secretary of the Navy* v. *Huff* also prohibits the distribution of petitions that advise or counsel insubordination or mutiny (which is unlawful under 18 U.S.C. 2387). See FMFO 5370.3 § 4(b)(3) (78-599 Pet. 4).

above (pages 33-35, *supra*), the prior approval requirement is essential to forestall the distribution of improper materials *before* they accomplish substantial harm and is thus necessary to the protection of the national security. Cf. *Greer* v. *Spock*, *supra*, 424 U.S. at 840.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1006

HAROLD R. BROWN,
SECRETARY OF DEFENSE, ET AL.,
Petitioners,

v.

ALBERT EDWARD GLINES,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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IN THE

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OCTOBER TERM, 1978

No. 78-1006

HAROLD R. BROWN,
SECRETARY OF DEFENSE, ET AL.,
Petitioners,

v.

ALBERT EDWARD GLINES,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

BRIEF FOR THE RESPONDENT

STATEMENT

Respondent was a Captain in the Air Force Reserves. He had been evaluated as dedicated, energetic, zealous officer, clearly the most competent navigator within his flight and probably the most competent within his entire group (A.9, Appendix A to this brief), and had accumulated more than 15 years of service in

the Air Force Reserves. (A. 31). Although he was a member of the Reserves, respondent had been on nearly full-time active duty for the two years prior to initiation of this lawsuit. (A. 8).

Respondent was concerned about the negative impact Air Force grooming standards were having on the morale and retention of servicemen in the Air Force; he prepared a petition to members of Congress and the Secretary of Defense to show the widespread dissatisfaction of servicemen with the grooming standards.[1] The substantive portion of the petition stated the following:

> We, the undersigned, all American citizens serving in the armed services of our nation, request your assistance in changing the grooming standards of the United States Air Force.
>
> We feel that the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy.

(A. 18-22) At the time of the events herein, respondent was serving active duty was involved in a navigator instructor upgrade training program. (A. 34).

[1] The record does not include an explanation of how grooming standards caused the problems indicated. Counsel's understanding is that the standards had a disparate effect on Blacks and Whites in the Reserves. Reservists had to satisfy the grooming standards for the weekend-a-month they were on active duty. Persons with tightly-curled hair, often Blacks, could mat their hair while on active duty and comb it out as a civilian to conform with current civilian hair styles. Persons with straight hair, often Whites, had to keep their hair short at all times, remaining out of style with civilian hair styles. This disparate effect caused racial tension.

In April, 1974, during a training flight to Japan, respondent had an overnight stopover at Anderson Air Force Base, Guam. After his plane landed in Guam, respondent handed a ground crew member a copy of the petition. The ground crew member took the petition back to his barracks and, in time, a total of eight servicemen signed the petition. (A. 25-27). For initiating the circulation of his petition in this manner, respondent was removed from active duty and transferred out of the Active Reserves to the Standby Reserves.

SUMMARY OF ARGUMENT

I.

The statutory protection afforded members of military service "communicating with a member of Congress" in 10 U.S.C. §1034 includes communication by petitions. Not only are petitions generally understood as a proper means of communicating with Congress, the right to petition the government has been understood as a fundamental right since colonial times. Furthermore, the legislative history of 10 U.S.C. §1034 demonstrates that it was enacted to open channels of communication between members of the armed services and members of Congress which explicitly included joint petitions.

II.

Respondent should not lose statutory protection even though his petition to members of Congress was directed additionally to the Secretary of Defense. Under *Street* v. *New York*, 394 U.S. 576 (1969) and *Yates* v. *United States*, 354 U.S. 298 (1959), the government

must prove to a certainty that the action taken against respondent was not based in the least degree on his petitions to members of Congress for respondent to lose statutory protection. The government cannot meet this burden.

Furthermore, since the addition of a copy of respondent's petition to the Secretary of Defense serves the congressional goals that underlie 10 U.S.C. §1034, it would be unjust, if not absurd, for respondent to lose statutory protection as a result of directing an additional copy to the Secretary of Defense.

III.

The Court's decision in *Greer* v. *Spock*, 424 U.S. 828 (1976), relied on by the government, is not dispositive of the issues in this case because the nature of the speech interests and the policies involved in the two cases are entirely different. The inability of a civilian national political candidate to make political speeches on a military base has very little impact on the candidate's ability to reach his national audience. However, the inability of a serviceman to circulate a petition to be signed by other servicemen on a military base has a substantial impact on the serviceman's ability to reach his limited audience. Furthermore, the decision to prohibit civilian campaign speeches on base comports with the American constitutional tradition of a politically neutral military establishment under civilian control. However, the decision to prohibit the circulation of petitions to the civilians constitutionally charged with control over the military establishment conflicts with the same constitutional tradition.

Prior restraints on speech are "the most serious and the least tolerable infringement on First Amendment Rights," *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 559 (1975), and the prior approval requirement is as serious an infringement on the first amendment rights of servicemen as is prior restraints on speech generally. Prior restraints on petitioning on-base can prove tantamount to a prohibition of all petitioning. For servicemen assigned to foreign bases and ships, it has that effect so long as servicemen are assigned to the base or so long as the ship is at sea. If timeliness has importance, a prior restraint amounts to total infringement. In every case, denial of permission to circulate a petition on-base substantially interferes with petitioner's ability to accomplish the desired communication. Furthermore, the prior approval requirement has the same procedural significance as other prior restraints.

Moreover, the broad delegation of authority to military commanders to restrain petitioning on the basis of such amorphous interests as "loyalty," "discipline" and "morale," invites censorship. In every case where permission to circulate on-base has been requested it has been denied, even when the government now admits that denial was wrongful. In the present case, respondent was taken off active duty and removed from the reserves even though his conduct was innocuous.

Applying the analysis employed in *Nebraska Press Association* v. *Stuart, supra*, demonstrates that the prior approval requirement is unnecessary, ineffective and unconstitutional. The danger to military interests

from petitioning is minimal, especially when compared with other forms of protest which may be exercised when the right to petition is denied. Furthermore, there are less restrictive alternatives available to the government to mitigate the dangers that petitioning might present. These alternatives include appropriate time, place and manner restrictions and the broad power of military authorities to punish disruptive petitioning.

ARGUMENT

I

The Court Of Appeals Was Correct In Finding That The Challenged Regulations Violate 10 U.S.C. §1034.

A. The Court of Appeals was correct in finding that the protections afforded armed forces personnel by 10 U.S.C. §1034 include communication by petition.

10 U.S.C. §1034 states:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

In the district court, the Court of Appeals and in this Court, the Government has argued that the protections afforded armed forces personnel by this statute do not extend to communication by petition because (1) the language of the statute is written in the singular and (2) the original incident which prompted

the statute involved a letter. Brief for the petitioners at 37-42. The lower courts in this case and in two other cases found this argument unpersuasive. *Glines* v. *Wade,* 401 F. Supp. 127 (N.D. Cal. 1975), 586 F.2d 675 (9th Cir. 1978), *cert. granted, sub. nom., Brown* v. *Glines,* No. 78-1006 (Mar. 19, 1979); *See, Huff* v. *Secretary of the Navy,* 413 F. Supp. 863 (D.D.C. 1976), 575 F.2d 907 (D.C. Cir. 1978), *cert. granted,* No. 78-599 (Mar. 19, 1979); *Allen* v. *Monger,* 404 F. Supp. 1081 (N.D. Cal. 1975), 583 F.2d 438 (9th Cir. 1978), *petition for cert. pending, sub. nom., Brown* v. *Allen,* No. 78-1005. This Court should find the argument unpersuasive as well.

In its brief the Government asserts that the language "communicating with a member of Congress" in §1034 by its nature omits any reference to petitioning. Brief for the petitioner at 37. But petitioning is certainly generally understood as a proper means of communicating with Congress.

To support an interpretation limiting the meaning of "communicating" to communication by individual letters, the Government's brief refers to portions of the Congressional Record purporting to quote from the Navy Regulations in effect in 1951 which regulated communication with Congress:

> At that time, Articles 1248 and 1249 of Navy Regulations (1948) provided "any letter from a member of the naval service to Congress or to a Congressman which affects the Naval Establishment should be sent through official channels." 97 Cong. Rec. 3776 (1951).

Brief for the petitioners at 38.

In fact, the above quotation is not from the text of Navy Regulations, but from a letter of the Secretary

of the Navy, which in turn quoted an opinion of the Judge Advocate General of the Navy.[2]

[2] The letter was from Francis P. Matthews, Secretary of the Navy and addressed to Congressman Byrnes of Wisconsin. The letter in its entirety is as follows:

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
Washington, March 13, 1951.

Hon. John W. Byrnes,
House of Representatives,
Washington, D. C.

DEAR MR. BYRNES: This is in reply to your letter of February 26, 1951, requesting and interpretation of articles 1248 and 1249, Navy Regulations (1948).

In an opinion dated April 7, 1950, the Judge Advocate General of the Navy, with reference to articles 1248 and 1249, Navy Regulations (1948) stated in conclusion:

"The provisions of the above-quoted articles 1248 and 1249 would seem to be sufficiently broad to cover any communication intended or designed to influence Congress or a Member of Congress to favor or oppose any legislation or appropriations affecting the Naval Establishment, whether pending, proposed, or suggested. Hence, in every case where a person in the naval service desires to send a communication to Congress, or a Member of Congress, the question to be answered by such person is whether his communication concerns legislation or appropriations relating to the Naval Establishment. Such a determination is made by the member of the naval forces at his own risk. If he has any doubt as to whether his proposed letter relates to the Naval Establishment, he should send it via the Secretary of the Navy.

"Accordingly, in the light of the above-quoted articles 1248 and 1249, it appears that any letter from a member of the naval service, to Congress or to a Congressman which affects the Naval Establishment, should be sent through official channels."

I consider this to be the correct interpretation of these articles. You will agree, I am sure to the basic administrative policy on which these articles are based: That the Department of the Navy should at all times be advised as to all matters relating to the Naval Establishment. These articles are not intended to prohibit correspondence between naval personnel and their Congressmen. Whenever correspondence addressed to a Congressman is sent via the Secretary of the Navy, it is, as a matter of policy, forwarded promptly.

Your inquiry in this regard is appreciated and your letter is being further referred to the Chief of Naval Operations for study of your suggestion that the articles might be clarified.

Sincerely yours,
FRANCIS P. MATTHEWS

Article 1248 of Navy Regulations (1948), which was entitled "Communications to the Congress," actually read as follows:

> *All petitions,* remonstrances, memorials and communications from any person *or persons* in the naval service, whether on the active or retired list, addressed to Congress, or to either House thereof, on any subject of legislations relating to the Naval Establishment, whether pending, proposed, or suggested, shall be forwarded through, or as authorized by, the Secretary of the Navy.

97 Cong. Rec. A4977 (1951) (emphasis added).

Contrary to the Government's assertions, this legislative history indicates that the meaning of "communicating" in §1034 does include communicating by petitions since §1034 was enacted to open channels of communication which explicitly included petitions.

Application of other rules of statutory construction suggests the same result. As stated by this Court, "[b]ecause the Act is remedial, it is to be construed broadly to effectuate its purposes." *Abbott Labs.* v. *Portland Retail Druggists,* 425 U.S. 1, 12, (1976).

The Courts of Appeals in *Brown* v. *Glines, supra* (78-1006), *Brown* v. *Allen, supra* (78-1005), and *Secretary of the Navy* v. *Huff, supra* (78-599), extensively

analyzed the language and legislative history of the statute. The majority of the Court of Appeals in *Huff* concluded,

> [T]he legislative history indeed leaves no doubt that the right to present a solitary, individual grievance to a member of Congress is encompassed by §1034. But there is no indication that this is the outer limit of the communication which Congress sought to protect. . . . We would suppose that quite often a soldier's intended communication with Congress could not effectively be accomplished through solitary letters, as, for instance, when the objective is to communicate widespread dissatisfaction concerning a particular grievance, rather than merely the grievance itself.
>
> * * *
>
> Particularly in view of the long and cherished tradition in this country, embodied in the first amendment . . . of collective presentation of grievances to those in authority in the form of petitions, we think it most unlikely that in protecting the right to communicate grievances to Congress, Congress did not intend to protect the right to solicit others to sign such communications.

Huff (78-599 Pet. App. 12a-13a)

The Court of Appeals in *Huff* also noted that D.O.D. Directive No. 1325.6, §III G (1969) refers to §1034 as protecting the right of a member of the armed forces to "petition or present any grievance to any member of Congress." *Huff* (78-599 Pet. App. 12a).

The Court of Appeals in *Allen* and *Glines* reached similar conclusions.

> Congress clearly intended to protect communication with several members of Congress at a time, even though it is used in the singular; while the record is not so clear, it is unlikely that Congress intended to restrict protected communication by more than one member of the armed forces at a time.
>
> We therefore hold that §1034 protects petitioning. The importance petitioning Congress has played in our history, combined with a legislative history that shows Congress concerned to keep communications open despite threats to discipline and a history of verbal changes in the statute that encourages a broad interpretation of its protections, all lead to this conclusion. The right to petition, of course, includes a reasonable opportunity to solicit signatures for the petition.

Allen (78-1005 Pet. App. 10a).

The Courts of Appeals' appreciation for the importance petitioning has played in our history is entirely justified. Not only is the right to petition protected by the First Amendment, but it is a right that was fundamental to the origins of the United States. "It is too often forgotten that the entire *raison d'etre* of the [First] Congress, assembled in Philadelphia, was to petition for redress." G. Wills, *Inventing America*, 57 (1978).

The right to petition was by 1774 a well-established principle of British law,[3] and in the colonies had been

[3] *See*, 1 W. Blackstone, *Commentaries* 138-39, ch. I §4 (Oxford, 1765), *id.* at 143 (American Edition, Philadelphia, 1771):

> 4. If there should happen any uncommon injury, or infringement of the rights beforementioned, which the ordinary

designated as a fundamental right as early as 1641.[4] The First Congress relied on assembly and petition as "the recognized way of addressing and defining what the seventeenth and eighteenth century Englishmen called 'fundamental law'." G. Wills, *supra*, 54 (1978).

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course of law is too defective to reach, there still remains a fourth subordinate right appertaining to every individual, namely, the rights of petitioning the king, or either house of parliament, for the redress of grievances.

(Typeset modernized). *See also*, The English Bill of Rights (1689), *reprinted in*, 1 B. Schwartz, *The Bill of Rights* 43 (1971):

[T]he said lords . . . being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have naturally done) for the vindicating and asserting their ancient rights and liberties, declare . . . that it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal. . . .

[4] MASSACHUSETTS BODY OF LIBERTIES, 1641

A Coppie of the Liberties of the
Massachusetts Colonie in New England

12. Every man, whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councel, or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner.

Reprinted in, 1 B. Schwartz, *The Bill of Rights* 73 (1971). Schwartz states, *id.* at 69, "[o]f the documents discussed thus far [English: Magna Carta (1215), Petition of Right (1628), Agreement of the People (1649), A Healing Question (1656), Bill of Rights (1689); American: First Charter of Virginia (1606), Fundamental Orders of Connecticut (1639), Maryland Act for the Liberties of the People (1639)], there is no doubt that the 1641 Massachusetts Act was the most important as a forerunner of the federal Bill of Rights."

The colonies had used group petitions to the King as a means of seeking redress of grievances as early as 1765,[5] and unanimously asserted the right to do so at the First Continental Congress.[6]

---

[5] After the Stamp Act in 1765, the colonists convened a Congress to assert their right to be treated as were English citizens. Included in their Declaration was an assertion of the right to petition.

DECLARATION OF RIGHTS AND GRIEVANCES, 1765

The members of this Congress, . . . with minds deeply impressed by a sense of the present and impending misfortunes of the British colonies on this continent; having considered as maturely as time will permit the circumstances of the said colonies, esteem it our indispensible duty to make the following declarations of our humble opinion respecting the most essential rights and liberaties of the colonists, and of the grievances under which they labor, by reason of several late Acts of Parliment.

. . . .

XIII. That it is the right of the British subjects in these colonies to petition the King or either House of Parliment.

1 B. Schwartz, *The Bill of Rights* 196-98 (1971).

[6] DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS, 1774

And whereas, Assemblies have been frequently dissolved, contrary to the rights of the people, when they attempt to deliberate on grievances; and their dutiful, humble, loyal, & reasonable petitions to the crown for redress, have been repeatedly treated with contempt, by his majesty's ministers of state:

The good people of the several Colonies . . . justly alarmed at these arbitrary proceedings of parliment and administration, have severally elected, constituted, and appointed deputies to meet and sit in general congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties may not be subverted:

Whereupon the deputies so appointed being now assembled, in a full and free representation of these Colonies, taking into their most serious consideration, the best means

As the states of the new country began erecting their own Constitutions, many included expressions of the rights of their citizens. The first to expressly protect petitioning was Pennsylvania, in 1776.[7] That

---

of attaining the ends aforesaid, do, in the first place, as Englishmen, their ancestors in like cases have usually done, for asserting and vindicating their rights and liberties, declare,

That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters of compacts, have the following Rights:

. . . .

Resolved, N.C.D. 8. That they have a right peaceably to assemble, consider their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

1 B. Schwartz, The Bill of Rights 216-17 (1971). The letters "N.C.D." before the resolution indicate that the resolution was adopted *nemine contradicente:* i.e., without dissent. Schwartz, *supra,* at 214. *Cf.,* the Declaration of Independence, ¶ 29 (1776):

In every state of these oppressions we have petitioned for redress in the most humble terms. Our repeated petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Reprinted in, 1 B. Schwartz, *The Bill of Rights* 254 (1971).

[7] A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH, OR STATE OF PENNSYLVANIA, 1776.

XVI. That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.

1 B. Schwartz, *The Bill of Rights* 276-77 (1971).

state was followed by similar provisions in Delaware (1776),[8] North Carolina (1776),[9] Massachusetts (1780),[10] New Hampshire (1783),[11] and the territory of

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[8] DELAWARE DECLARATION OF RIGHTS, 1776

A Declaration of the Rights and Fundamental Rules of the Delaware State, formerly stiled, The Government of the counties of New-Castle, Kent and Sussex, upon Delaware.

. . . .

Sect. 9. That every man hath a right to petition the legislature for the redress of grievances in a peaceable and orderly manner.

1 B. Schwartz, *The Bill of Rights* 276-77 (1971).

[9] NORTH CAROLINA DECLARATION OF RIGHTS, 1776

XVIII. That the people have a right to assemble together, to consult for their common goods, to instruct their Representatives, and to apply to the Legislature, for redress of grievances.

1 B. Schwartz, *The Bill of Rights* 286-87 (1971).

[10] Massachusetts' Constitution was not adopted until 1780. A 1778 version had been overwhelmingly rejected by the people for lack of a Bill of Rights, among other reasons. 1 B. Schwartz, *The Bill of Rights* 337 (1971). The Constitution finally passed contained this provision:

XX. The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives; and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and the grievances they suffer.

Id., 372-73.

[11] NEW HAMPSHIRE BILL OF RIGHTS, 1783

XXXII. The people have a right in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their representatives; and to request of the legislative body, by way of petition or remonstrance, redress of wrongs done them, and of the grievances they suffer.

1 B. Schwartz, *The Bill of Rights* 378-79 (1971).

Vermont (1777) (Vermont was not recognized as a state until 1791).[12] *See also,* the Georgia Constitution (1777).[13]

Even though most states had adopted their own Bills of Rights, the 1787 federal Constitution contained no such provisions. 2 B. Schwartz, *The Bill of Rights* 435 (1971) [hereinafter cited as Schwartz]. The lack of a Bill of Rights created serious reservations among Antifederalists about ratification. Seven of eleven states proposed amendments to the Constitution,[14] and one state, North Carolina, refused to ratify the Constitution until a Bill of Rights was included.[15]

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[12] VERMONT DECLARATION OF RIGHTS, 1777

XVIII. That the people have a right to assemble together, to consult for their common good—to instruct their representatives, and to apply to the legislature for redress of grievances by address, petition or remonstrance.

Reprinted in, 1 B. Schwartz, *The Bill of Rights* 324 (1971).

[13] GEORGIA CONSTITUTION, 1777

Art. LXIII. No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State; at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid.

Reprinted in 1, B. Schwartz, *The Bill of Rights* 300 (1971).

[14] The seven states were Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York, North Carolina. *See,* 2 Schwartz, 627-933. Pennsylvania approved the constitution without amendments, but a minority of the convention circulated a document after the convention that influenced later public opinion as to why a Bill of Rights should be adopted. Schwartz, 628.

[15] 2 Schwartz 932-33.

Four of the seven states that expressed a desire for amendments included in their recommendations a protection for the right to petition.[16]

In 1789, when James Madison assumed the leadership in meeting the widespread demand for a federal Bill of Rights, a consensus had developed among Americans regarding the fundamental rights that the Bill of Rights should protect.[17] Madison recommended to Congress fourteen of the twenty-two state proposals. It is significant that more states recommended the right to petition than recommended free speech, grand jury indictment, double jeopardy, self-incrimination, just compensation, right to counsel, right to confront witnesses, right to know nature of accusation, and that powers not delegated are reserved to the people.[18] There was no challenge to the right to petition during the Congressional debates on the amendments,[19] and it was, of course, included in the First Amendment.

After adoption in the Bill of Rights, the right to petition, intertwined with the right of assembly, has repeatedly been found woven into the very fabric of the United States. *See e.g., United States* v. *Cruikshank,* 92 U.S. 545, 552 (1875); *Thomas* v. *Collins,*

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[16] The four states were Virginia, Maryland, New York, and North Carolina. *See,* 2 Schwartz 729-933. Two days after drawing up its own list of amendments, a motion was made in the Massachusetts convention to add a provision which, in part, protected petitioning. The amendment was denied. 2 Schwartz 680-81.

[17] 2 Schwartz 983.

[18] *See,* 2 Schwartz 1167.

[19] *See,* 2 Schwartz 1054-1167.

323 U.S. 516, 530 (1945); *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 222 (1967).[20] It has always been recognized as the appropriate mechanism for citizens to inform their elected representatives.[21] It has always included the right to

[20] From *United States* v. *Cruikshank*, 92 U.S. at 552:

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of government, republican in from, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

From *Thomas* v. *Collins*, 323 U.S. at 530:

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights. Cf. DeJogne v. Oregon, 299 U.S. 353, 364, and therefore are united in the First Article's assurance. Cf. 1 Annals of Congress 759-760.

From *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. at 222:

> We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press.

[21] During the House Debates on the Bill of Rights, a motion was made to add the right of the people "to instruct their representatives." 2 Schwartz 1091. The motion was defeated by Madison's argument that the right to instruct representatives is included in the rights of free speech and petition—particularly in the right of petition. 2 Schwartz 1096. Representative Jackson (Georgia), speaking in favor of the amendment, discussed the

circulate a petition as well as to present an individual grievance.[22] In connection with 10 U.S.C. §1034, it is also linked to maintenance of civilian control over the military establishment.[23]

importance of encouraging the people to communicate with their representatives.

> The people will be encouraged to come forward with their instructions, which will form a fund of useful information for the Legislature. We cannot, I apprehend, be too well informed of the true state, condition, and sentiment of our constituents, and perhaps this is the best mode in our power of obtaining information. I hope we shall never shut our ears against that information which is to be derived from the petitions and instructions of our constituents. I hope we shall never presume to think that all wisdom of this country is concentred [sic] within the walls of this House. Men, unambitious of distinctions from their fellow-citizens, remain within their own domestic walk, unheard and unseen, possessing all the advantages resulting from a watchful observance of public men and public measures, whose voice, if we would descend to listen to it, would give us knowledge superior to what could be acquired amidst the cares and bustles of a public life . . . .

2 Schwartz 1095-96.

[22] It [the First Amendment] simply protects the petitioners in their right to get up the petition, circulate it for signatures, and have it presented.

II Tucker, *Constitution of the United States* 671 (1899). *See also*, *Yancy* v. *Commonwealth*, 135 Ky. 207, ____, 122 S.W. 123, 124 (1909), construing the right to petition under a state constitution:

> [T]he Bill of Rights confers upon any citizen, or number of citizens, the right to petition the Legislature of the state for any necessary and proper purpose, and if one may lawfully sign his name to a petition to be presented to the Legislature for a proper purpose, he may likewise lawfully circulate the petition and procure others to sign it.

[23] *See*, Remarks of the Honorable Jacob K. Javits, then Congressman from New York, speaking in 1951:

> Mr. Speaker, with millions of Americans serving in the Armed Forces and with the new emphasis upon a civilian

As the Courts of Appeals recognized, the significance of petitioning in this country's history mintended to exclude it from protected communication in §1034 "most unlikely." *Huff* (78-599 Pet. App. 13a).

The Government finally asserts that interpreting §1034 to exclude communication by petition "is supported by good sense" because "circulating a petition on base . . . [produces] an inevitable potential that factions will be created, morale lowered and discontent spread—with the result that the discipline and fighting capacity of the military is injured." Brief for the petitoners at 41-42.

The nature and extent of the harm threatened by on-base petitioning is discussed in section III, B, 2 of this brief, *infra*. At this point, it is sufficient to note that, whatever potential circulating petitions on base has for producing the evil attributed to it, nothing in the language or legislative history of §1034 reflects Congressional concern for such potential. Rather, the value of petitions to communicate widespread dissatisfaction, the clear intention of Congress to open the channels of communication between members of the armed services and members of Congress, and the historical importance of petitioning all suggest that Congress would not have chosen to exclude petitions from the communication protected in §1034.

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army—America's traditional weapon against dictatorship and oppression—the right of Armed Forces personnel to communicate freely with members of Congress is of the utmost importance. It will be recalled that the Congress endeavored to preserve this right inviolate by a new provision . . . [referring to what is now 10 U.S.C. §1034].

97 Cong. Rec. A4977 (1951).

B. The Court of Appeals was correct in finding that regulations placing a prior restraint on all petitioning on military bases were not necessary to the security of the United States.

Regulations which interfere with communications protected by 10 U.S.C. §1034 are improper unless the regulations are necessary to the security of the United States.

The prior approval requirements imposed by the challenged regulations place a prior restraint on all petitioning on military bases. In each of the reported cases where permission was sought to circulate petitions on military bases, such permission was denied. *See, Carlson* v. *Schlesinger,* 511 F.2d 1327 (D.C. Cir. 1975); *Allen* v. *Monger* and *Moses* v. *Foley,* 583 F.2d 438 (9th Cir. 1978), *petition for cert. pending, sub. nom., Brown* v. *Allen,* No. 78-1005; *Brown* v. *Huff,* No. 78-599. In *Huff,* armed forces officials conceded that the denials were wrongful. *Huff* (78-599 Pet. App. 3a).

In reference to these regulations, the Court of Appeals for the Ninth Circuit stated:

> Prior restraints are suspect in the constitutional context. *Nebraska Press Ass'n* v. *Stuart,* 427 U. S. 539, 96 S. Ct. 2791, 49 L. Ed.2d 683 (1976); *New York Times Co.* v. *United States,* 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971). They stand no better in a statutory setting. Well publicized petitioners may inconvenience the military. Some petitions may even produce division and morale problems, but we cannot say that there is no less restrictive method than total prior restraint to protect the national security. Since the regulations are overbroad and exceed

the needs of the national security, we affirm the district court.

Allen (78-1005 Pet. App. 12a). *See also, Glines* (78-1006 Pet. App. 9a) and *Huff* (78-599 Pet. App. 16a-17a).

This conclusion is justified because of the limited nature and extent of the harm threatened by on-base petitioning; the availability of other measures to mitigate the harm threatened (including reasonable time, place and matter restrictions and punishment for disruptive petitions); and the ineffectiveness of the prior command approval requirement in protecting the military interests. A discussion of these considerations appears in section III, B, below.

II.

IF THIS COURT FINDS THAT THE CHALLENGED REGULATIONS VIOLATE 10 U.S.C. §1034, THE LOWER COURTS' RULINGS IN FAVOR OF RESPONDENT SHOULD BE AFFIRMED.

A. The action taken against respondent was based upon petitions directed to members of Congress as well as a petition to the Secretary of Defense.

It is unnecessary for the Court to separately consider respondent's right to circulate a petition to someone other than a member of Congress. The fact that among the group of petitions respondent circulated one was addressed to the Secretary of Defense is important only if the record "negates the possibility" that the sanction respondent suffered was not

based in the least degree on his petitions to members of Congress. *Street* v. *New York*, 394 U.S. 576, 588 (1969); *Yates* v. *United States*, 354 U.S. 298, 311-312 (1957). *See also, Easton* v. *City of Tulsa*, 415 U.S. 697, n. at 699 (1974); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) (White, J., concurring); *United States* v. *Donner*, 497 F.2d 184 (7 Cir. 1974), *cert. den.*, 419 U.S. 1047 (1974).

Street dictates that a sanction cannot stand where the record fails to prove that the sanction was founded exclusively on nonprotected speech activity.[24] Applying the rationale behind *Street* indicates that where, as here, a sanction is imposed for a general violation without a specific designation of the particular offense, there is an "unacceptable danger that the trier of fact will have regarded the [petitions to Congress and the Secretary] as 'intertwined' and have rested the [sanction] on both together." *Street*, 394 U.S. 576, 588 (1969).

The trier of fact for the purposes of respondent's dismissal and transfer is the Air Force. The danger specified in *Street* is eliminated only if the Air Force can sustain its strong burden of proof to enable this Court to say "with certainty" that respondent's petitions to members of Congress were not even a con-

[24] *Street* involved a criminal sanction, but has been extended to include the situation at bar—civil sanctions against a federal employee. *See, Tygrett v. Washington*, 543 F.2d 840 (D.C. Cir 1974) (*Street* applied to sanction against a D.C. police officer); *Waters* v. *Peterson*, 495 F.2d 91 (D.C. Cir. 1973) (*Street* applied to sanction against a Federal Bureau of Census employee). Therefore, assuming *arguendo* that peptitions to the Secretary of Defense are not protected speech, petitioners must nevertheless meet the heavy burden of *Street* before respondent's dismissal and transfer can be accepted.

tributing cause to respondent's dismissal and transfer from the Active Reserves. *Street*, 394 U.S. 576, 589 (1969). If the Court cannot find from the record this degree of certainty, affirming the lower courts' rulings in favor of respondent on the basis of his petitions to members of Congress will satisfy the entire case. The record demonstrates that the Air Force cannot meet this burden.

1. Nowhere in the record is there any indication that petitions to Congress were deemed protected while those to the Secretary of Defense were not. On the contrary, all indications are that any petitioning done by the respondent was considered improper.

2. The District Court treated the petitions as a unit, making no distinction based on the person to whom the petition was to be sent. In its unpublished Opinion and Order of December 12, 1975, the District Court stated:

> In April, 1974, while on Active Duty Status at Travis Air Force Base, [respondent] circulated *a petition* aimed at relaxing Air Force hair-length regulations . . . .
>
> The letter notifying Captain Glines of his dismissal from the Active Reserves and his transfer to the standby Reserves stated that his actions in circulating *the petition* . . . demonstrated that he had failed "to meet the professional standards expected of an officer in the Air Force." . . . [T]he [petitioners] have admitted that *had it not been for the distribution of the petition*, the decision to remove Captain Glines from Active Duty would not have been made at this time.
>
> . . . .
>
> In this case *the evidence established that but for his petitioning activities*, Captain Glines would have . . . remained on Active Duty. . . . .

(A. 31-32, 34) (emphases added).

These conclusions by the District Court further demonstrate that the government treated Captain Glines' petitioning as a single act, and that no distinction was ever made based on the addressees.

3. Colonel Wade's letter of Reassignment and Transfer, dated April 26, 1974 (A. 24) refers to advice Colonel Wade had given respondent not to circulate the petition. *Id.*, ¶2. Since each copy of the petition contains as its final paragraph a statement of the other designated recipients (*see*, A. 18-22), Colonel Wade could easily have informed respondent that petitions to Congressmen were permitted but those to the Secretary of Defense were not. Moreover, the petition originally reviewed by Colonel Wade was a handwritten copy addressed to Senator Cranston. (Clerk's Record, 4, 21).

4. Signatories to the Guam petition testified in affidavits that the petition with which they were involved was Exhibit F-1 to the plaintiff's complaint (A. 18), the petition addressed to Senator Cranston.

> IO: I show you Exhibit F-1 attached to Complaint filed by Captain Glines, and request that you read it and determine whether this is the petition that you came into contact with on that date?
>
> A: Yes, to my knowledge that is the petition, *the exact petition.*

[R. at 166, Affidavit of Sergeant Nilles (emphasis added).]

> Q: Sergeant Wolf, you have seen Exhibit F-1 attached to the Complaint in this matter. Is that exhibit the haircut petition with which you involved [sic] at Anderson Air Force Base, Guam, on or about 15 April, 1974?

A: yes.

(R. at 160, Affidavit of Sergeant Wolf.)

IO: I show you Exhibit F-1, attached to the Complaint filed by Captain Glines. Does that exhibit generally reflect what you read or what you saw and read on or about 15 April, 1974?

A: Yes.

(R. at 274, Affidavit of Sergeant Ellzey.)

5. Prior practice of the military with respect to petitions gives no reason to believe the designated receipient of the petition was of any significance. In *Brown* v. *Huff*, No. 78-599; *Brown* v. *Allen*, No. 78-1005; and *Brown* v. *Moses*, *id.*, prior restraints were applied to petitions addressed solely to members of Congress. *See*, Brief for Petitioners, No. 78-599 at 7 (*Huff*); Petition for Writ of Certiorari, No. 78-1005 at 4 (*Allen*, *Moses*). If the government did not hesitate to apply prior restraints to petitions to Congress in these instances, it cannot now be inferred that no action would have been taken against respondent had he only addressed his petitions to members of Congress.

The record does not, as required by *Street*, negate with certainty the possibility that respondent's dismissal and transfer was at least in part due to his petitioning members of Congress. The most reasonable inference is that his Congressional petitions were indeed a reason for the action taken against him. Therefore, the copy of the petition to the Secretary need not be considered by this Court. If the action taken against respondent is not supportable as to the petitions to Congress, it is supportable as to none. *See, Yates* v. *United States*, 354 U.S. 298, 312 (1957).

B. Protections afforded to armed forces personnel for petitions to members of Congress should be held to include a petition directed additionally to the Secretary of Defense.

Even if the actions taken against respondent had been based solely on his petition to the Secretary of Defense, respondent should not be held to lose statutory protection because he sent an additional copy to the Secretary of Defense.

Respondent's petition to the Secretary of Defense was one of five petitions, each with exactly the same substantive provisions, reworded only so that each would speak directly to its recipient. (A. 18-22). The other four recipients were all members of Congress. The final paragraph of each petition indicated that the signers were similarly petitioning each of the other four recipients "in the hope that one of our elected or appointed officials will help correct this problem." *Id.*

Petitions to Congress that include a petition to the Secretary of Defense was undoubtedly not within the specific contemplation of the Congress that enacted 10 U.S.C. §1034. However, "it is no bar to interpreting a statute as applicable that 'the question which is raised on the statute never occurred to the legislature.' " *Eastern Air Lines, Inc.* v. *CAB*, 354 F.2d 507, 510-11 (D.C. Cir. 1965). To construe the statute in this instance, the Court must therefore "[start] from the areas where the legislative intent is readily discernible, and [project] to fair and reasonable corollaries of that intent for the specific issue" at hand. *Montana Power Co.* v. *Federal Power Commission*, 445 F.2d 739, 746 (D.C. Cir. 1971), *cert. den.* 400 U.S. 1013, (1971). *See*, Cardozo, Nature of the Judicial Process 15 (1921).

This Court has stated the guidelines for this method of statutory construction:

> The strict letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress. [citations omitted]. And unjust or absurd consequences are, if possible, to be avoided.

Fleischmann Construction Co. v. *United States,* 270 U.S. 349, 360 (1926). *Cf., Philbrook* v. *Glodgett,* 421 U.S. 707, 713-714 (1975).

The legislative history of 10 U.S.C. §1034 indicates congressional concern with maintaining civilian control over the military establishment. *See,* Extension of Remarks of Hon. Jacob K. Javits, 97 Cong. Rec. A4977 (1951), *supra* p. 15, n.22. In order to maintain civilian control, the Congress must communicate freely with members of the armed forces and with individuals who determine military policies—the Secretary of Defense and the secretaries of the various military branches. *See, supra* p.6, n.1; *see,* also 10 U.S.C. §1034; Cong. Rec. 3776-77, A4977-78 (1951).

For purposes of reforming Air Force grooming regulations, the Secretary of Defense is a logical recipient both of respondent's petition and Congressional inquiries. The Secretary of Defense is the head of the Department of Defense and, as such, has authority, direction, and control over the Department of the Air Force. 10 U.S.C. §133(a); 10 U.S.C. §8010. The Secretary of Defense had been delegated Presidential authority regarding Air Force uniform standards, which includes grooming standards. Exec. Ord. #11390, ¶ 7 (January 24, 1968); 33 Fed. Reg. No. 16 at 841 (1968). Furthermore, no danger to any governmental interest

results from directing a copy of a Congressional petition to the Secretary of Defense.

Respondent's petition to the Secretary of Defense is therefore consistent with the congressional goals that underlie 10 U.S.C. §1034. It would be unjust if not absurd to afford the protection of the statute to one member of the armed forces who petitions Congress while withholding such protection from another member of the armed forces who petitions Congress and demonstrates the courtesy and respect of simultaneously petitioning the Secretary of Defense. Such a result would be especially inappropriate since 10 U.S.C. §1034 is remedial legislation, to be construed broadly. *Abbott Labs.* v. *Portland Retail Druggists,* 425 U.S. 1, (1976).

III.

THE COURT OF APPEALS WAS CORRECT IN FINDING THAT REGULATIONS REQUIRING COMMAND APPROVAL PRIOR TO CIRCULATION OF PETITIONS ON A MILITARY BASE VIOLATE THE FIRST AMENDMENT.

A. The Court's decision in *Greer* v. *Spock* is not dispositive of the issues in this case.

It should be obvious that the Court's decision in *Greer* v. *Spock,* 424 U.S. 828 (1976) is not dispositive of the issues in this case. *Greer* involved the right of civilian political campaigners to enter Fort Dix, New Jersey, a "closed" military base, to make political speeches and distribute campaign literature. This case involves the right of military personnel, properly on

a military base, to circulate to other military personnel, properly on a military base, a petition to the government for redress of grievances. While both cases involve prior command approval requirements grounded on the military interest in maintaining loyalty, discipline and morale, the nature of the competing speech interests and the policies involved are entirely different.[25]

The essential dissimilarity between the two speech interests is demonstrated by looking at the impact a denial of permission would have on the individual's ability to accomplish the desired communication. In *Greer*, the respondents were candidates for national political office who were seeking to communicate their ideas and gain political support among voters. The personnel at Fort Dix, and the sum of all personnel on all military bases, were a small percentage of the

[25] Twice in its brief, the Government has quoted the following statement from this Court's opinion in *Greer* v. *Spock* :

> [t]here is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.

This statement was certainly not intended by this Court as a constitutional standard which would obviate the need for constitutional analysis. For example, a military commander could not employ the use of the rack or another torture against an unpopular serviceman under his command—no matter how sincere his belief that such action was necessary to avert a clear danger to loyalty, discipline or morale to troops on the base under his command—without his actions being subject to scrutiny under the eighth amendment's protection against cruel and unusual punishment. Nor could he discriminate in advancement on the basis of race, even if equal treatment on the basis of race would negatively impair the loyalty and morale of a majority of his troops.

prospective voters. Though barred from engaging in speech activities on base, the respondents in *Greer* were not impaired in reaching the vast majority of their audience. Furthermore, the respondents in *Greer* could still have reached the on-base audience through paid political advertisements on radio, television and newspaper. Members of national, though minor, political parties, the candidates had their party financial resources available to reach their audience, both civilian and inservice, through the use of expensive means of communication.

In this case, respondent was a Captain in the Air Force Reserves. He was seeking to communicate to members of Congress and the Secretary of Defense widespread dissatisfaction among armed service personnel, demonstrating the signers' belief that "the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy." (A. 18-22). Respondent's audience consisted of government officials and members of the armed services and his resources were limited to his own personal assets. Denied the ability to circulate a petition on-base, respondent was denied the ability to reach his limited audience where he and the other potential petitioners lived and worked. He was prevented from accomplishing his desired communication in the most traditional, logical, and inexpensive manner. In a very practical way, respondent was prevented from accomplishing his desired communication at all.

An individual letter from respondent would only have indicated respondent's individual belief that there was widespread dissatisfaction. A lot of individ-

ual letters might have accomplished the same result as a petition with an equal number of signatures; but it is much more difficult to convince someone to write a letter than sign a petition with the same message, and respondent would have been limited to those personnel with whom he could discuss the problems of Air Force grooming standards in this fashion.[26]

Respondent could not circulate his petition on Guam at all, whether on base or off. Air Force regulations prohibit circulation of petitions in foreign countries without prior approval, both on and off military bases. *See,* Brief for the Petitioners at 20, n.8. During his overnight stopover, respondent didn't have time to even request permission.

Respondent was left with the possibility of circulating his petition in town, out of uniform, if he could have found someplace in town where servicemen gathered. In fact, he left copies of his petition in a few shop windows. (A. 11).

The denial of permission to circulate a petition on base has an even greater impact in situations like that in *Brown* v. *Allen* (78-1006) where the base was an aircraft carrier. In such situations, a prohibition against on-base petitioning results in total infringement of the right to petition during long periods at sea.

[26] It may be that respondent could have stood at a crossroads and called to strangers to discuss the problems of air force grooming standards. However, he would have been hindered by the absence of a petition—the traditional accompaniment to legitimate communication about issues with strangers. To avoid an unlawful assembly, he would have to have called them one by one, or in small groups. Furthermore, to allow respondent to function as a petitioner without a petition, but not as a petitioner with a petition, would be nonsensical.

The essential dissimilarity between applicable policies is evident from this Court's opinion in *Greer.* The Court's opinion initially distinguished decisions involving so-called "open bases," finding that the authorities at Fort Dix had not abandoned any claim of special interest in who walks, talks, or distributes leaflets on the streets of the base. 424 U.S. at 836. The Court *held* that the Fort Dix regulations were valid on their face as part of "the historically unquestioned power of its commanding officer summarily to exclude civilians from the area of his command." *Id.* at 838. Since respondents had no "generalized constitutional right" to engage in first amendment activities on a military base, the prior approval requirements were constitutional on their face. *Id.*

Unlike private citizens, military personnel have a right and affirmative duty to be on a military base and, subject to appropriate limitations, do have a "generalized constitutional right" to engage in First Amendment activities on a military base. *See e.g., United States* v. *Schmidt,* 16 USCMA 57, 36 CMR 213 (1966); *United States* v. *Gray,* 20 USCMA 63, 42 CMR 255 (1970). *See generally,* Moyer, *Justice and the Military,* Chapter 4 (1972). A military base is where a serviceman lives, works and has contacts with other members of the service. His leisure and recreation areas are on a military base as well as the work areas. A military base is where military speech is most likely to take place.

Furthermore, *Greer* involved ratifying a policy of insulating the military from "both the reality and

appearance of acting as a handmaiden for partisan causes of candidates." 424 U.S. 828, 839. The base policy of prohibiting civilian campaign speeches on base was "wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control." *Id.*

The speech restrained here was directed to the civilians who are constitutionally charged with responsibility for control of the military, and indicated criticism of military regulations. Policies restraining such speech conflict with this same constitutional tradition.

The government argues that a military base is not a "public forum" and for that reason, *Greer* v. *Spock* applies to this case. *See,* Brief for the Petitioners at 26-27. Respondent does not rely upon the "public forum" doctrine to find constitutional protection for the right to petition. *Cf., Steck* v. *Connally,* 199 F. Supp. 104 (D.D.C. 1961, in which a civil service employee's circulation of a petition to Congress was held protected speech despite the fact that circulation took place at work during working hours.)

However, a military base does possess many of the attributes of a "public forum" for servicemen assigned to the base. Furthermore, as stated by an authority cited by the government,

> No longer does the right to effective freedom of expression turn on the common law property rights of the state, and no longer does it turn on whether the particular place at issue had historically been dedicated to the exercise of First Amendment rights . . . . In each case, the 'crucial question' is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Stone, *Fora Americana: Speech in Public Places,* 1974 Sup. Ct. Rev. 233, 252-53.

The question of whether one serviceman handing a petition to another serviceman is "basically incompatible" with the normal activity of a military base is not answered by the decision that campaign speeches of civilian political candidates are not incompatible.[27]

B. Taking the important governmental interest served by the challenged regulations into account, the Court of Appeals was correct in finding that the application of a prior restraint on all petitioning on military bases was substantially overbroad.

1. The significance of the prior approval requirement as a prior restraint.

Respondent recognizes that the government's interest in maintaining loyalty, discipline and morale is

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[27] Moreover, as the Court of Appeals noted in *Huff,* the regulations validated in *Greer* dealt only marginally with petitions, if they dealt with petitions at all. The regulation authorizing prior restraint read as follows:

> The distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person . . . is prohibited on the Fort Dix Reservations without prior approval . . . .

424 U.S. at 831.

Under this regulation, the only form of "publication" which might include petitions is the catch-all "other writings." This Court's opinion in *Parker* v. *Levy,* 417 U.S. 733, 760 (1974), indicated that military regulations should not be struck for overbreadth if they only marginally intrude upon constitutionally protected activities. For this reason as well, validating the Fort

important. It is just as clear, however, that the right to petition the government for redress of grievances is important and that the means selected to enforce the armed services' interest, a prior restraint on petitioning, is "the most serious and the least tolerable infringement on First Amendment Rights." *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 559 (1975).

The government seeks to lessen the significance of the prior restraint in this case, arguing that "[i]n only the most narrow sense is speech restrained by the prior approval requirement." *See*, Brief for the Petitioners at 31. The government, however, fails to appreciate the significance of its prior approval requirement. Professor Tribe describes two distinct reasons for the particular seriousness of prior restraint requirements: (a) "dissemination delayed may prove tantamount to dissemination denied." and (b) "censors uncontrolled by courts tend to deny publication to material protected by the first amendment." Tribe, *American Constitutional Law* at 725 and 726 (1978). Both concerns are involved with the prior approval requirement in the challenged regulations.

(a) Dissemination delayed may prove tantamount to dissemination denied.

As indicated earlier in this brief, denial of permission to circulate a petition on a military base can substantially interfere with the petitioner's ability to accomplish the desired communication. *Supra* pp. 23-24. In the case of military bases in foreign countries,

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Dix regulations has only marginal significance for determining the constitutionality of regulations aimed directly at limiting the right to petition.

regulations require permission to circulate petitions both on and off base. *See*, Brief for the Petitioners at 20, n.8. For ships at sea, denial of permission to circulate on base amounts to total infringement during long periods at sea. Even in the case of domestic bases, denial of permission to circulate a petition on base isolates the circulator from his audience.

Furthermore, in the case of petitions where timeliness is of particular significance, denial of permission can have an impact at least as great as delays on newsworthy articles. *See*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1975). For example, in *Brown* v. *Allen*, (#78-1005) Captain Monger denied permission to circulate a petition asking Congress "to investigate the necessity of having the Hancock make another West Pacific cruise," but might have allowed circulation "well after the Hancock had been deployed . . . when the petition would be of no effect." *Allen* (78-1005 Pet. App. 14a and 12a).

Also involved is the procedural significance of prepublication restraints. As noted by Professor Tribe,

> The extraordinary power of a prior restraint to foreclose timely expression is derived primarily from the body of procedural rules which form a backdrop to the doctrines in this field. An individual who speaks, or a newspaper that publishes, is ordinarily free in a subsequent criminal prosecution to assert the claim that the speech or publication was protected by the first amentmend. But where a prior restraint operates, anyone who ignores it may lose the right to assert that constitutional defense in a subsequent prosecution for ignoring the restraint instead of obeying it while challenging it judicially.

Tribe, *American Constitutional Law* at 726 (1978) [hereinafter cited as Tribe].

Thus, in this case, respondent is limited to raising the facial invalidity of the prior approval requirement even though the actions for which he was punished were completely innocuous. *See,* Pet. App. 13a.

(b) Censors uncontrolled by courts tend to deny publication to material protected by the first amendment.

Professor Tribe describes the problem of "overbroad delegation" as follows:

> Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issues are overbroad because they grant such officials the power to discriminate—to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly. This covert censorship cannot be checked adequately by judicial review of the scheme as applied in particular cases. For first amendment protection often depends on balancing free speech rights and governmental interests in particular situations, which depends in turn on a close, after-the-fact scrutiny of the factual circumstances by the reviewing court. Except in those rare instances in which bad faith is manifest, the abuse of administrative discretion is likely to find shelter behind a record of contradictory testimony and retrospective rationalization. A court may seek to make its own characterization of the expressive activity, but its perception of the facts is inherently subjective. When was a demonstration too obstructive of traffic? A noise too loud? Violence imminent? The tendency is to be satisfied that the evidence is sufficient if the record is not "totally devoid of evidentiary support," the minimal due process standard. Factual review is therefore an unreliable cure for an overbroad delegation, and thus the Supreme Court has consistently chosen facial invalidation of statutes containing essentially standardless delegations in areas affecting first amendment rights.

Tribe, at 733-34.

The dangers of overbroad delegation are particularly significant in the case of military authorities. As stated by Judge Parker in *Carlson* v. *Schlesinger,*

> Military authority is not trained or attuned to the sensitivity involved in questions relating to First Amendment rights. It is quite understandable, therefore, that when confronted with regulatory language as that found in the two regulations, where acknowledged constitutional rights are tempered by such laudable yet amorphous terms as 'morale,' 'loyalty,' and 'discipline,' the commander will favor and make determinative the military considerations.

364 F. Supp. 626, 639-640 (D.D.C. 1973), *rev'd on other grounds* 511 F.2d 1327 (D.C. Cir. 1975).

Thus, in *Brown Huff,* (78-599) the military authorities denied permission to circulate petitions when the government now admits denials were wrongful. *See,* Brief for the Petitioners at 22 n. 10. In *Brown* v. *Allen,* (78-1005) the District Court found that permission to circulate the petitions in that case was wrongfully denied, under the regulations' standards. *See, Allen, supra* (Pet. App. 23a).

In the present case, the extremity of the measures taken against respondent and the statements made concerning respondent's petition eloquently demonstrate the dangers of the prior approval requirement. For preparing his mildly worded petition and initiat-

ing its circulation among eight servicemen, respondent was abruptly taken off active duty and then removed from the Air Force Reserves. (A. 24, Brief for the Petitioners at 8.)

According to Colonel Harley S. Black, commanding officer of Anderson Air Force Base, Guam, respondent's petition, as respectful as it was, "had great potential to bring undue embarrassment on the Air Force." (Clerk's Record at 46). The Colonel's lack of appreciation for the importance of the constitutional liberties involved is clear. He said,

> All told eight of my personnel were signatories to the petition, each feeling, I suspect, it was a 'notable cause' and thus, in need of their support. The members were young, junior enlisted types, all of whom have since been counselled and shown the error of their ways.

(A. 25).

It is no wonder that this Court has described a prior restraint on publication as "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 562 (1975).

2. Applying the analysis employed in *Nebraska Press Association* v. *Stuart*.

The issue before this Court is whether the Court of Appeals was correct in finding that regulations placing a prior restraint on all petitioning on military bases violates the First Amendment. The Court of Appeals applied the analysis employed by this Court in *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1975).

"The Supreme Court insists on less restrictive alternatives to prior restraint when they are available, and it critically examines whether the restraint will have its intended effect." (Pet App. 12a, *citing, Nebraska Press Ass'n* v. *Stuart, supra.*) The Court of Appeals concluded that the regulations were substantially overbroad. (Pet. App. 13a-14a).

Nebraska Press, like the present case, involved the use of a prior restraint on first amendment rights to protect a recognized, important interest. There the interest was the right to a fair trial; here it is the maintenance of loyalty, discipline and morale. The issue in *Nebraska Press* was not whether the interest in ensuring a fair trial was sufficient to justify some limitation on the exercise of first amendment rights, but whether the use of a prior restraint could be justified as the chosen means. *Nebraska Press, supra* at 561. This Court concluded it could not. *Id* at 570.

In determining that the prior restraint was not justified in *Nebraska Press*, this Court employed a three part test. 427 U.S. 539, 562. Translated into the issues involved in this case, the areas of inquiry should be (a) the nature and extent of the harm threatened; (b) the availability of other measures to mitigate the harm threatened and (c) the effectiveness of the prior command approval requirement in protecting the military interests. To justify the use of a prior restraint here, the government must show that, in light of these three factors, a prior restraint is necessary to avoid the danger. *Id.*

(a) The nature and extent of the harm threatened.

The government has never been very clear about how circulating petitions affects loyalty, discipline

and morale. Rather, the government's brief simply states that "circulating a petition on base [produces] an inevitable potential that factions will be created, morale lowered and discontent spread—with the result that the discipline and fighting capacity of the military is injured," leaving the Court to infer how this result follows from the proposed cause. Brief for the Petitioners at 41-42.

In analyzing the nature and extent of the harm threatened by on-base petitioning, it is important to include only the harm peculiar to petitioning, excluding harm that might result from forms of speeh currently permitted by regulations. Further, the consideration of harm from petitioning must be reduced to the extend that appropriate time, place, and manner restrictions regulate the on-base exercise of petitioning. The government recognizes that "the regulations do not restrict a serviceman's freedom to engage in oral discussions of political topics or other issues either off base or on base." Brief for the Petitioners at 19. Respondent does not dispute the authority of the armed services to impose reasonable restrictions on the time, place and manner of petitioning on base—including limitations on the number of people gathering at one place at one time. *See,* Pet. App. 11a-12a; Respondent's brief in opposition to cert. at 2-3; *Brown* v. *Allen* (78-1005 Pet. App. 30a-32a).

The harm under consideration, then, is limited to the communicative impact which petitioning alone produces.

In the only military petition case which went to trial, Judge Robert Peckham stated, "[d]efendants maintain that circulation of a petition with which

members of a crew might disagree is enough in and of itself to cause disruption on board ship and therefore impair morale." *Brown* v. *Allen* (78-1005 Pet. App. 21a). It is possible that a person holding a view opposing one stated in a petition would become upset seeing a petition when he or she would not have heard an oral communication. However, it is also possible for one to overhear an oral communication when one would not have seen a petition. To argue harm from persons opposing a view stated in a petition suggests that a greater number will be upset by a petition than from an oral discussion—at most a doubtful proposition.

Furthermore, a basic premise of the First Amendment's guarantees is that suppression is not the proper way to avoid the impact of ideas. As noted by the Court of Appeals in this case,

> The First Amendment protects this country's basic commitment to open and vigorous debate. We have assumed as a nation that free discussion will be likely to lead to the right decisions, that, as Justice Brandeis said, when falsehoods and fallacies abound, 'the remedy to be applied is more speech, not enforced silence.' *Whitney* v. *California,* 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring). The First Amendment reflects a conscious choice to prefer citizen autonomy to conformity.

Pet. App. 10a.

As stated by Professor Tribe,

> [I]f the constitutional guarantee is not to be trivialized, it must mean that government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of

> discussion and awareness. Whatever might in theory be said either way, the choice between "the dangers of suppressing information and the dangers of its misuse if it is freely available" is, ultimately, a choice "that the First Amendment makes for us."

Tribe, at 581. (citation omitted.)

The remaining harm resulting from petitioning can only come from those who agree with a view stated in a petition. The findings of fact in Judge Peckham's opinion indicates that from the military perspective the harm from those who agree comes from the act of solicitation, not the communication to servicemen. Judge Peckham found that Admiral Monger, who had been Captain of the U.S.S. Hancock, "might have permitted circulation of the Hancock petition had it not 'been asking for support in the form of a signature' and been directed to a member of Congress." *Brown* v. *Allen, supra* (Pet. App. 21a).

Aside from giving increased communicative value to a member of Congress by sending a petition with all of the supporting signature, Admiral Monger's fear must be that soliciting signatures on a petition would somehow commit the signers to greater fidelity to a statement than would making, reading or hearing statements on the same issue. In other words, the harm from the act of petitioning would come from the greater seriousness of purpose that may be produced by petitioning the government for redress of grievances rather than just talking, if that be a harm.

Assuming that petitioning does produce greater seriousness of purpose than other forms of expression, that can only be considered harmful if it leads to some further harmful result. Indifference is not in itself an important military value to be protected.

The government has provided no evidence that exercising the right to petition would impel the petitioners to further, harmful acts. In fact, all indications are to the contrary. For example, *Brown* v. *Allen* (78-1005, Pet. cert. pending) originally involved two suits, *Allen* v. *Monger* and *Moses* v. *Foley,* that were consolidated for trial. Each suit had five named plaintiffs. In *Allen,* all named plaintiffs indicated a desire to circulate a petition. *See, Brown* v. *Allen* (78-1005 Pet. App. 16a). In *Moses,* the plaintiffs actually circulated their petition for a week before seeking permission. *See, Brown* v. *Allen, supra* (Pet. App. 18a). At the time, the district court opinion was filed, more than two years after plaintiffs filed suit, four of the plaintiffs were still in the Navy, two of them still assigned to their original ship, the U.S.S. Hancock. There is no indication in the record of these two cases or any of the petition cases, that any of the plaintiffs failed to perform their military duty, despite the fact that they not only declared themselves to be circulators of petitions, but actually filed suit to enforce their right to petition.

The court of Appeals reached the following conclusion:

> We do not believe that vocal disagreement with public policy by itself necessarily leads to disobedience to orders. "I think, and any society which truly believes in a First Amendment must assume, that soldiers like other citizens can disagree with governmental policy and yet still realize that they must follow the legal requisites of that policy, including military service, until the policy is changed by democratic means." *Carlson* v. *Schlesinger,* 167 U.S. App. D.C. 325, 335, 511 F.2d 1327, 1337 (1975) (Bazelon, J., dissenting).

Pet. App. 11a n.8.

The officials' conduct in petition cases suggests that they were motivated less by a fear of creating factions and discontent than a sense that the act of petitioning the government somehow has an unsavory character.

The government still maintains that denial of permission to circulate the Hancock petition in *Brown* v. *Allen* (78-1005) was proper despite that petition's benign nature. Brief for the petitioners at 22 n.10. That petition stated:

> Dear Congressman Stark,
>
> We, the undersigned crew members of the U.S.S. HANCOCK, in recognition of the fact that the United States is officially no longer at war with the countries of Indo-China, and because the HANCOCK has already been in commission for 29 years, respectfully request that you ask Congress to investigate the necessity of having the HANCOCK make another West Pacific cruise.

Brown v. *Allen* (78-1005 Pet. at 4 n.3).

In the present case, Col. Black initiated an investigation of the respondent because his respectfully worded petition "had great potential to bring undue embarrassment on the Air Force." (Clerk's Record at 46). On the basis of "embarrassment" and "discredit" (A. 24) this "dedicated," "energetic, zealous officer," "clearly . . . the most competent navigator within [his] flight, and probably the most competent within the entire group" (A. 9), with more than 15 years of service in the Air Force Reserves (A. 31) was removed from active duty and transferred to inactive status.[28]

[28] Respondent's officer evaluations covering September, 1971 through July, 1973 (Clerk's Record 12-20) are included as Appendix A to this brief. These evaluations were intended to be included as a part of the Appendix for this case, but were mistakenly omitted by the government when preparing the Appendix.

To the extent that the officials' distate for petitioning is shared by other members of the armed services, and even if general distaste for the exercise of fundamental liberties can lead to disruption, the solution is for this Court to encourage respect for constitutional rights. It would be ironic, indeed, for this Court to endorse disrespect for those very rights that members of the armed forces voluntarily pledge their lives to protect. "The right to petition Congress for a redress of grievances is too dear to permit its exercise to be limited by petty tyrannies." *United States* v. *Schmidt*, 16 U.S.C.M.A. 57, 61 (1966), (concurring opinion).

(b) The availability of other measures to mitigate the harm threatened.

As indicated earlier, respondent does not dispute the authority of the armed services to impose reasonable restrictions on the time, place and manner of petitioning on base—including limitations on the number of people gathering at one place at one time. (*See, supra* p. 31). So long as such restrictions do not "deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought . . ." they are entirely proper. *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941).

Furthermore, should petitioning activities lead to a disturbance of the peace or threaten good order and discipline, they are punishable under 10 U.S.C. §§916,

917, and 934 (1976), (Articles 116, 117 and 134, respectively, of the Uniform Code of Military Justice [UCMJ]). Moreover, acts done with the intent of causing a disturbance are punishable under 10 U.S.C. §880 (1976) (Article 80 of the UCMJ), without awaiting any disturbance.[29]

[29] 10 U.S.C. §916 (Art. 116) states:

Riot or breach of peace

Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.

10 U.S.C. §917 (Art. 117) states:

Provoking speeches or gestures: towards any other person subject to this chapter shall be punished as a court-martial may direct.

10 U.S.C. §934 (Art. 134) states:

General article

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. §880 (Art. 80) states:

Attempts

(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

The Court of Appeals concluded that,

> Punishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty periods, and protection from pressure by superiors who are seeking signatures would adequately protect the government's interest.

(Pet. App. 12a), citing the limitations adopted by Judge Peckham in *Allen* v. *Monger, supra (Brown* v. *Allen* 78-1005 Pet. App. 30a-32a) and approved on appeal.

The government argues that these less restrictive alternatives are not sufficient to mitigate the harm threatened because, "the injury to national security occurs when the improper material is distributed and discipline and morale are lowered, or the military mission is threatened." Brief for the petitioners at 33. However, the government does not explain how this chain reaction occurs, let alone how the bad result happens before it can be stopped.

The government further complains that "the court of appeals offered no argument showing that [alternative measures] would be adequate to avoid or 'mitigate the effects' of an improper distribution." *Id.* However, the government has provided no basis for finding that less restrictive alternatives would not sufficiently protect the government's interest. Certainly the government has the burden of justifying the use of a prior restraint. "Any system of prior restraints of expression comes to this Court with a heavy presumption against its constitutional validity." *Bantam Books* v. *Sullivan*, 372 U.S. 58, 70 (1963). In *Nebraska Press*, this Court "reaffirm[ed] that the guarantees of freedom of expression are not an abso-

lute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact." 427 U.S. 539, 570.

When a government regulation is aimed at the communicative impact of expressive activity to protect a compelling governmental interest, the government has the burden of showing that the regulation is necessary to protect the asserted interest. Not only must the interest be compelling, the regulation must be narrowly aimed at those permissible objectives so as not unnecessarily to reach expressive conduct protected by the first amendment. Tribe, at 602.

When a government regulation is designed to protect a military interest, it should not be declared unconstitutional if the regulation could validly be applied to numerous situations and invalidly to only 'marginal' situations. *Parker* v. *Levy,* 417 U.S. 733, 760 (1974). However, if the regulation's reach into protected conduct is substantial, it is unconstitutitutional on its face. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973).

To justify the use of a prior restraint on petitioning in the present regulations, the government must show that this extraordinary measure is necessary to protect loyalty, discipline and morale in all but exceptional circumstances.[30] It is inconceivable that a form

[30] In footnote 11 of its brief, the government states:

> Because this case involves a challenge to the regulations on their faces, the Court must sustain them if *anything* that might have been written and circulated in Guam in 1974—or in a combat-ready missile base in North Dakota in 1980—could possibly present a clear danger to military readiness.

of expression as mild as petitioning presents such an extraordinary threat to loyalty, discipline and morale that the ordinary means of control will not suffice.

It is instructive to compare petitioning with other forms of protest where ordinary measures of control are employed. In *The Concept of the Public Forum: Cox* v. *Louisiana,* 1965. Sup. Ct. Rev. 1, Professor Kalven distinguished three forms of protest:

> It may prove helpful to risk the pretentiousness of distinguishing among three closely related gestures of protest often lumped together in popular discussions of the civil rights movement: revolution, civil disobedience, and protest. A revolutionary gesture is intended as a direct defiance of law and order; it is a declaration of open war; it is coercive and obstructive. It may well be morally justifiable, but only under the stringent conditions by which Western tradition has measured the right to revolution.
>
> * * *

The government here misstates the standard for facial invalidity. The proper standard appears in Tribe: "A law is void on its face if it 'does not aim specifically at evils within the allowable areas of [government] control, but . . . sweeps within its ambit other activities that consitute an exercise 'of protected expressive or associational rights' ". Tribe, at 710, *quoting, Thornhill* v. *Alabama,* 310 U.S. 88, 97 (1940) (statute prohibiting all picketing void on its face since it bans peaceful picketing protected by the first amendment).

The "substantial overbreadth" requirement of *Parker* v. *Levy, supra* does not change the legal standard to a "scintilla" test, but demands that the "sweep" into protected expression be substantial.

The government does not challenge the Court of Appeals' finding that respondent has standing to raise facial invalidity under *Parker* v. *Levy, supra. (See,* Pet. App. 13a).

> Civil disobedience is deliberate violation of law for the sake of protest and as a matter of individual conscience. It is a gesture we associate with Socrates, Thoreau, and conscientious objectors. In the famous formula of Plato's *Apology* and *Crito*, this gesture requires that the actor accept the punishment. It is a refusal to obey the law coupled with a willingness to accept the legal consequences. Insofar as it is symbolic, it is also an intense form of protest.
>
> * * *
>
> Finally, there are the various forms of mass protest in public places using parades, picketing, and so on. Here the essential feature is appeal to public opinion. The intention is not to violate that law, and the claim is one of privilege in the exercise of basic rights.

Kalven, *supra*, at 10-11.

Professor Kalven concluded that, when done in an orderly manner, the last of the three is protected by the first amendment. *Id.* at 12. Quoting from *Edwards* v. *South Carolina*, 372 U.S. 229 (1963) Professor Kalven noted:

> The memorable thing about *Edwards* was that Mr. Justice Stewart, speaking for everyone but Mr. Justice Clark, said of the defendants and of their "rights of free speech, free assembly, and freedom to petition for redress of their grievances": *"The circumstances of this case reflect an exercise of these basic constitutional rights in their most pristine and classic form."*

Id. at 6-7 (emphasis in original).

Viewed in this perspective, peaceful petitioning involves the exercise of "basic constitutional rights in [its] most pristine form." Furthermore, among the various forms of peaceful protest, petitioning is the most peaceful, least disruptive of all.

Contrast the exercise of the right to petition by Captain Glines in this case with the form of protest exercised by Captain Levy in *Parker* v. *Levy*, 417 U.S. 733 (1974). Levy was a physician assigned as Chief of the Dermatological Service at the base hospital, Fort Jackson, South Carolina. During the summer of 1966, Captain Levy made several public statements to enlisted personnel at the base, urging them not to obey orders to go to Vietnam and not to fight if they did go. The following statement was representative:

> The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: They should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.

Parker, supra at 737. In conjunction with these statements, Captain Levy refused to follow orders to perform his training duties "because of his medical ethics." *Parker, supra* at 736.

Captain Levy's conduct would be classified as a 'revolutionary' gesture by Professor Kalven. It was clearly inappropriate for a military officer and, if effective, would have substantially interfered with the military mission of the base, training special forces

aides. *Id.* Yet, the government employed the ordinary procedures for enforcement of military obligations.

> Appellee's military superiors originally contemplated nonjudicial proceedings against him under Art. 15 of the Uniform Code of Military Justice, 10 U.S.C. §815, but later determined that court-martial proceedings were appropriate. The specification under Art. 90 alleged that appellee willfully disobeyed the hospital commandant's order to establish the training program, in violation of that article, which punishes anyone subject to the Uniform Code of Military Justice who "willfully disobeys a lawful command of his superior commissioned officer." Statements to enlisted personnel were listed as specifications under the charges of violating Arts. 133 and 134 of the Code. Article 133 provides for the punishment of "conduct unbecoming an officer and a gentleman," while Art. 134 proscribes, *interalia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces."

Parker, supra at 737-38.

It is inconceivalbe that the milder form of expression, petitioning, could not be satisfactorily managed by these same measures.

Finally, military commanders are in a unique position to mitigate dangers which might accompany the exericse of first amendment freedoms. As stated by Judge Peckham in *Allen* v. *Monger, supra*:

> As Captains of their respective ships, Admirals Monger and Foley exerted considerable leadership on their crews. Admiral Monger had successfully asserted the principles of racial equality on board ship and had had a substantial impact in lessening racial tensions by informing the crew that racism was not to be tolerated on board ship. If either Captain had informed the crew that the free expression of differing views was not only to be tolerated, but to be encouraged in a free society, such leadership would have had a substantial impact in lessening the disruption, if any, which might be caused by circulation of a petition.

(Pet. App. 22a). These observations are equally applicable to commanders of land bases.

(c) The effectiveness of the prior command approval requirement in protecting the military interests.

The third and final consideration employed in *Nebraska Press* is the effectiveness of the prior restraint in serving the asserted interests. Even if circulating petitions on base were to present serious dangers and even if there were no other remedies available to the government to mitigate those dangers, the government should be required to demonstrate the effectiveness of the prior restraint before servicemen desiring to exercise the right to petition are forced to tolerate the least tolerable infringement on this fundamental constitutional right.

The government's asserted interest is defined in the regulations as "loyalty," "discipline" and "morale". The loyalty of those servicemen who value our form of government is certainly not increased when they are denied the right to petition the government for redress of grievances. "Loyal" is defined in Webster's New Collegiate Dictionary (1977) as "faithful in allegiance to one's lawful sovereign or government." Our Pledge of Allegiance is made to a symbol of a republic: "a government in which supreme power re-

sides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according to law." *Id.* at 983.

Furthermore, it is unlikely that the morale of servicemen who value their constitutional rights is increased when they are denied constitutional rights. Only those servicemen who, like Col. Black, care little for fundamental liberties are disspirited when citizens exercise their constitutional rights. The measures recommended by Judge Peckham, *supra* p. 40, provide a more constitutionally palatable means of promoting those servicemen's morale.

The remaining governmental interest is discipline. If denying the right to petition were enough to stifle a serviceman's concern about his grievances, these regulations might promote discipline. However, concern about serious grievances is not likely to disappear simply because the right to petition is suppressed. Furthermore, only petitions about serious grievances could arguably justify suppression under the regulations.

As noted by Professor Kalven, *supra* p. 38, there are many different forms of protest, even when limiting consideration to different forms of expression. Parades, picketing, sit-in demonstrations, counselling disobedience and revolution, all present more dangers to military interests than does peaceful petitioning. Furthermore, serious grievances can spawn other, more destructive non-speech measures of protest, when peaceful petitioning is eliminated.

Grievances stemming from the Vietnam war spawned many protests, military as well as civilian.

Among those protests were the anti-war petitions in *Carlson* v. *Schlesinger, supra* and the amnesty petition in *Brown* v. *Huff,* (78-599, *see,* Pet. App. 3a, n.2). Another of those protests is described in *Chenoweth* v. *Van Arsdall,* Mis. No. 73-1 (USCMA Mar. 13, 1973), 1 Mil. L. Rptr 2098 (1973). In that case Patrick Chenoweth, an enlisted man in the United States Navy, was charged with dropping a wrench or other metallic object into the gears of the U.S.S. Ranger, an aircraft carrier docked in the United States pending departure to the Western Pacific. The wrench caused extensive damage to the main reduction gears of the Ranger's number 4 engine. Repair of this damage, at a cost of about $800,000.00, delayed the departure of the Ranger for several months.

Not only is petitioning far less damaging to military interests than the form of protest exercised in *Chenoweth,* participants in petitions to the government are quite visible. Should petitioning lead to disruption, the participants can easily be controlled and called to account. Patrick Chenoweth was acquitted. *See,* Affidavit of Eric A. Seitz, appended hereto as Appendix B.

C. Conclusions

Placing little value in the importance of the right to petition the government for redress of grievances, the armed services have placed a prior restraint on all petitioning on military bases. Each time a request has been made to circulate a petition on base, the request has been denied. It hasn't mattered what the nature of the particular petition was. There was an anti-war petition *(Carlson),* a petition supporting amnesty *(Huff),* a petition about the age of a ship *(Allen)* and

one about a ship's home port *(Moses)*. There were polite petitions, *e.g., Allen*, and petitions with strident language, *e.g., Moses*. There were petitions overseas, *e.g., Huff*, and petitions at domestic ports, *e.g., Allen* and *Moses*. All requests were denied. When respondent circulated his petition about grooming standards to eight servicemen, he was removed from active duty and kicked out of the Air Force Reserves.

Five times servicemen have come to the federal courts for relief from the armed service's prior restraint. In four of those cases, the federal courts have granted the requested relief. Respondent requests that this Court find the prior restraint on all on-base petitioning to be unconstitutional.

It is respondent's contention that this prior restraint is unnecessary and ineffective and, like most prior restraints, unconstitutional. Restraining petitioning does not eliminate the concerns which spawn petitions, and military interests would be better served by taking steps to insure that petitioning is done peacefully rather than restraining it. Unlike other forms of protest, peaceful petitioning is consistent with civility and compatible with military service.

Respondent would conclude as did Mr. Justice Rehnquist of this court in a speech republished in the Indiana Law Journal:

> I would like to return finally to another quotation from Learned Hand:
>
> > What do we mean when we say that first of all we seek liberty? I often wonder whether or not we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.

I would not underrate the importance of constitutions or laws in preserving freedom of expression, any more than would Judge Hand, but I would be very skeptical that what they can do by themselves is sufficient to preserve informed public discussion. The truly resolute political revivalist will not be deterred by the threat of being driven from the podium. Indeed, he may glory in it. The zealot will not be turned aside by barbed words or sneering looks. But surely freedom of expression is too important a matter to be left entirely to political revivalists and to zealots. There must be room in the process for the less positive, thele ss informed, the thin-skinned. But only in an atmosphere of civility can these forensic late bloomers be expected to play the game.

Judge Hand says the ultimate fate of freedom, and surely he would include here freedom of expression, is reposed in the hearts and minds of men and women. An atmosphere of civility is an indirect assurance of continuing to maintain the broad based support of this liberty in its fullest form in the minds and the hearts of the men and women of this country. These men and women are not apt to rise up in its defense if they feel that freedom of expression is the prerogative of only a few, in which they do not participate and from which they derive no benefit. They are even less apt to rise to its defense if those who claim the freedom for themselves would deny it to others. I am convinced, however, that so long as the men and women of this country can believe that the process of debate and discussion is not simply the special preserve of some small group,

> but is instead a process in which all may participate and from which all will benefit, this freedome will be secure in their minds and hearts.

Rehnquist,"Civility and Freedom of Speech," 49 Indiana Law Journal 6-7 (1973).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

/s/ David M. COBIN
David M. Cobin
Court-appointed Attorney
for Respondent

APPENDIX

17 JUL 1972
22135 PM

PROCESSED BY DPABPE

I. IDENTIFICATION DATA (Read AFM 36-10 carefully before filling entries)

1. LAST NAME—FIRST NAME—MIDDLE INITIAL	2. AFSN	3. ACTIVE DUTY GRADE	4. PERMANENT GRADE
Glines, Albert E	552-52-9680FV	NONEAD	Captain

5. ORGANIZATION, COMMAND AND LOCATION	6. AERO RATING	CODE	7. PERIOD OF REPORT	
314th Tac Alft Sq McClellan AFB, Calif (AFRES)	Sr Nav	1	FROM: 30 Sep 71	THRU: 31 May 72
	8. PERIOD OF SUPERVISION: 306		9. REASON FOR REPORT: CRO	

II. DUTIES—PAFSC 15358 **DAFSC** 15358 Navigator, Airlift (Squadron Level)

Obtains and presents briefing information. Prepares mission documents and flight plans. Provides, tests, and inspects navigational equipment prior to missions. Navigates aircraft on transport missions by pilotage, dead reckoning, celestial, and other means. Accomplishes additional administrative work as directed.

III. RATING FACTORS (Consider how this officer is performing on his job.)

	NOT OBSERVED					
1. KNOWLEDGE OF DUTIES	○	SERIOUS GAPS IN HIS KNOWLEDGE OF FUNDAMENTALS OF HIS JOB.	SATISFACTORY KNOWLEDGE OF ROUTINE PHASES OF HIS JOB.	WELL INFORMED ON MOST PHASES OF HIS JOB.	EXCELLENT KNOWLEDGE OF ALL PHASES OF HIS JOB.	EXCEPTIONAL UNDERSTANDING OF HIS JOB. EXTREMELY WELL INFORMED ON ALL PHASES. ☒
2. PERFORMANCE OF DUTIES	○	QUALITY OR QUANTITY OF WORK OFTEN FAILS TO MEET JOB REQUIREMENTS.	PERFORMANCE MEETS ONLY MINIMUM JOB REQUIREMENTS.	QUANTITY AND QUALITY OF WORK ARE VERY SATISFACTORY.	PRODUCES VERY HIGH QUANTITY AND QUALITY OF WORK. MEETS ALL SUSPENSES.	QUALITY AND QUANTITY OF WORK ARE CLEARLY SUPERIOR AND TIMELY. ☒
3. EFFECTIVENESS IN WORKING WITH OTHERS	○	INEFFECTIVE IN WORKING WITH OTHERS. DOES NOT COOPERATE.	SOMETIMES HAS DIFFICULTY IN GETTING ALONG WITH OTHERS.	GETS ALONG WELL WITH PEOPLE UNDER NORMAL CIRCUMSTANCES.	WORKS IN HARMONY WITH OTHERS. A VERY GOOD TEAM WORKER.	EXTREMELY EFFECTIVE IN WORKING WITH OTHERS. ACTIVELY PROMOTES HARMONY. ☒
4. LEADERSHIP CHARACTERISTICS	○	OFTEN WEAK. FAILS TO SHOW INITIATIVE AND ACCEPT RESPONSIBILITY.	INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY ADEQUATE IN MOST SITUATIONS.	SATISFACTORILY DEMONSTRATES INITIATIVE AND ACCEPTS RESPONSIBILITY.	DEMONSTRATES A HIGH DEGREE OF INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY. ☒	ALWAYS DEMONSTRATES OUTSTANDING INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY ☐
5. JUDGEMENT	○	DECISIONS AND RECOMMENDATIONS OFTEN WRONG OR INEFFECTIVE.	JUDGEMENT IS USUALLY SOUND BUT MAKES OCCASIONAL ERRORS.	SHOWS GOOD JUDGEMENT RESULTING FROM SOUND EVALUATION OF FACTORS.	SOUND, LOGICAL THINKER. CONSIDERS ALL FACTORS TO REACH ACCURATE DECISIONS. ☒	CONSISTENTLY ARRIVES AT RIGHT DECISIONS. AN AUTHORITY ON HIGHLY COMPLEX MATTERS. ☐
6. ADAPTABILITY	○	UNABLE TO PERFORM ADEQUATELY IN OTHER THAN ROUTINE SITUATIONS.	PERFORMANCE DECLINES UNDER STRESS OR IN OTHER THAN ROUTINE SITUATIONS.	PERFORMS WELL UNDER STRESS OR IN UNUSUAL SITUATIONS.	PERFORMANCE EXCELLENT EVEN UNDER PRESSURE OR IN DIFFICULT SITUATIONS.	OUTSTANDING PERFORMANCE UNDER EXTREME STRESS. MEETS THE CHALLENGE OF DIFFICULT SITUATIONS. ☐
7. USE OF RESOURCES	(M) (P)	INEFFECTIVE IN CONSERVATION OF RESOURCES. MATERIEL PERSONNEL	USES RESOURCES IN A BARELY SATISFACTORY MANNER. MATERIEL PERSONNEL	CONSERVES BY USING ROUTINE PROCEDURES. MATERIEL PERSONNEL	EFFECTIVELY ACCOMPLISHES SAVINGS BY DEVELOPING IMPROVED PROCEDURES. MATERIEL PERSONNEL	EXCEPTIONALLY SKILLED IN USING RESOURCES. MATERIEL PERSONNEL
8. WRITING ABILITY AND ORAL EXPRESSION	(W) (S)	UNABLE TO EXPRESS THOUGHTS CLEARLY. LACKS ORGANIZATION. WRITE SPEAK	EXPRESSES THOUGHTS SATISFACTORILY ON ROUTINE MATTERS. WRITE SPEAK	USUALLY ORGANIZES AND EXPRESSES THOUGHTS CLEARLY AND CONCISELY. WRITE SPEAK	CONSISTENTLY ABLE TO EXPRESS IDEAS CLEARLY. WRITE SPEAK	OUTSTANDING ABILITY TO COMMUNICATE (WRITTEN) (ORAL) WITH OTHERS. WRITE SPEAK

IV. MILITARY QUALITIES (Consider how this officer meets Air Force standards.)

	NOT OBSERVED					
	○	BEARING OR BEHAVIOR INTERFERE SERIOUSLY WITH HIS EFFECTIVENESS.	CARELESS BEARING AND BEHAVIOR DETRACT FROM HIS EFFECTIVENESS.	BEARING AND BEHAVIOR CREATE A GOOD IMPRESSION.	ESPECIALLY GOOD BEHAVIOR AND BEARING. CREATES A VERY FAVORABLE IMPRESSION. ☒	BEARING AND BEHAVIOR ARE OUTSTANDING. EXEMPLIFIES TOP MILITARY STANDARDS. ☐

AF [illegible] 77 PREVIOUS EDITION OF THIS FORM WILL BE USED UNTIL EXHAUSTED. AFPER THIS FORM. PREVIOUS EDITIONS WILL BE OBSOLETE.

EXHIBIT B-1

COMPANY GRADE OFFICER EFFECTIVENESS REPORT

V. OVER-ALL EVALUATION (Compare this officer ONLY with officers of the same grade.)

SPECIFIC JUSTIFICATION REQUIRED FOR THESE SECTIONS						SPECIFIC JUSTIFICATION REQUIRED FOR THESE SECTIONS	
UNSATISFACTORY	MARGINAL	BELOW AVERAGE	EFFECTIVE AND COMPETENT		VERY FINE	EXCEPTIONALLY FINE	OUTSTANDING
☐	☐	☐	☐	☐	☐ ☐	☒	☐

VI. PROMOTION POTENTIAL

1. DOES NOT DEMONSTRATE A CAPABILITY FOR PROMOTION AT THIS TIME ☐	2. PERFORMING WELL IN PRESENT GRADE. SHOULD BE CONSIDERED FOR PROMOTION ALONG WITH CONTEMPORARIES ☐
3. DEMONSTRATES CAPABILITIES FOR INCREASED RESPONSIBILITY. CONSIDER FOR ADVANCEMENT AHEAD OF CONTEMPORARIES ☒	4. OUTSTANDING GROWTH POTENTIAL BASED ON DEMONSTRATED PERFORMANCE. PROMOTE WELL AHEAD OF CONTEMPORARIES ☐

VII. COMMENTS FACTS AND SPECIFIC ACHIEVEMENTS: Captain Glines clearly is the most competent navigator within my flight, and probably the most competent within the entire group. My observations of him during several MAC support missions makes me completely confident of his exceptionally high level of skills, knowledge, and judgment. He has been among the most active, if not the most active, participant in the Reserve Program. His flying time during the past 12 months was approximately 800 hours. He has flown all available Flying Training Periods, has made himself available for MAC support missions on an almost unlimited basis and has performed a number of "fill in" administrative duties for the squadron when needed. His work has been uniformly excellent. His mobilization potential is of the highest. STRENGTHS: In addition to the highly superior navigational competence described above, Captain Glines is an officer possessing superior leadership potential. He is highly intelligent, dependable, and thoroughly considerate of the needs of others. Further, Captain Glines has the courage, as well as the ability and initiative, to assume responsibility where appropriate. SUGGESTED ASSIGNMENTS: Captain Glines is currently awaiting reassignment to the 349th MAG. After his requalification in the new aircraft I would anticipate he should progress rapidly to instructor and flight examiner. SELF IMPROVEMENT EFFORTS: Captain Glines is currently taking a correspondence course in Evaluation of Financial Reports, a graduate level course given by the University of California. He has applied for entrance to the graduate school of Economics at UC. OTHER COMMENTS: Captain Glines' transfer will be a loss keenly felt by this unit. His performance has been outstanding. Captain Glines has used his personal and professional capabilities to actively promote equal opportunity programs. **Captain Glines is a student studying for his Masters Degree.**

VIII. REPORTING OFFICIAL

NAME, GRADE, AFSN SSAN, AND ORGANIZATION	DUTY TITLE		SIGNATURE
JOHN M COHAN, Major 564-38-5683FV, 314th TASq McClellan AFB, Calif (AFRES)	Flight Commander		John M Cohan
	AERO RATING: Sr Navigator	CODE: 1	DATE: 7 July 72

IX. REVIEW BY INDORSING OFFICIAL

I have observed the performance of Captain Glines and concur with the remarks and ratings of the reporting official.

NAME, GRADE, AFSN SSAN, AND ORGANIZATION	DUTY TITLE		SIGNATURE
CHESTER W ANDERS, Lt Colonel 317-14-7511FV, 314th TASq McClellan AFB, Calif (AFRES)	Squadron Commander		Chester W Anders
	AERO RATING: Command Pilot	CODE: 1	DATE: 10 July 72

B-2

17 JUL 1972
22 AUG 72

LAST NAME-FIRST NAME-MIDDLE INITIAL	AFSN/SSAN	ACTIVE DUTY GRADE
Glines, Albert E	552-52-9680FV	NONEAD

(CHECK APPROPRIATE BLOCK AND COMPLETE AS APPLICABLE)

[X] SUPPLEMENTAL SHEET TO RATING FORM WHICH COVERS THE FOLLOWING PERIOD OF REPORT	☐ LETTER OF EVALUATION COVERING THE FOLLOWING PERIOD OF OBSERVATION

FROM	THRU	FROM	THRU
30 Sep 71	31 May 72		

Precede comments by appropriate data, i.e. section continuation, indorsement continuation, additional indorsement, etc. Follow comments by the authentication to include: name, grade, AFSN, organization, duty title, date and signature.

ADDITIONAL INDORSEMENT

Concur. The evaluation of this officer accurately portrays his performance and abilities. My contacts with him have impressed me with his potential.

John A Forsythe

JOHN A FORSYTHE, Colonel, 541-14-3967FV, 940th Tactical Airlift Group, Commander, 12 Jul 72

MICROFILMED 03 AUG 72

B-3

HISTORICAL RECORD COPY — PROCESSED BY DEAR — 15 AUG 1973

DATA (Read and follow carefully. Type or print clearly.) — 081

1. LAST NAME, FIRST NAME AND INITIAL	2. SSAN	3. ACTIVE DUTY BASE AND ADDRESS (CODE)	4. PERMANENT GRADE
Glines, Albert E.	552-52-9680 FV	NOHEAD	Captain
5. ORGANIZATION, COMMAND AND LOCATION	6. DEMO RATING / CODE	7. PERIOD OF REPORT	
301 MASq (Assoc) (AFRES) Travis AFB CA 94535	Navigator / 1	FROM 1 Jun 72 THRU 25 Feb 73	
	8. REASON FOR EXPIRATION OF REPORT: 199	9. REASON FOR REPORT: CRO	

II. PRESENT DUTY

PAFSC 1545L PAFSC 1545L SQUADRON NAVIGATOR C-141.

Navigates aircraft to accomplish cargo airlift and other assigned missions. Plans the navigational phase of each mission and insures that all navigational equipment is inspected and preflighted. Performs minor in-flight maintenance and maintains flight logs and records.

III. RATING FACTORS (Consider how this officer is performing on his job)

	NOT OBSERVED					
1. KNOWLEDGE OF DUTIES		SERIOUS GAPS IN HIS KNOWLEDGE OF FUNDAMENTALS OF HIS JOB	SATISFACTORY KNOWLEDGE OF ROUTINE PHASES OF HIS JOB	WELL INFORMED ON MOST PHASES OF HIS JOB	EXCELLENT KNOWLEDGE OF ALL PHASES OF HIS JOB. X	EXCEPTIONAL UNDERSTANDING OF HIS JOB. EXTREMELY WELL INFORMED ON ALL PHASES
2. PERFORMANCE OF DUTIES		QUALITY OR QUANTITY OF WORK OFTEN FAILS TO MEET JOB REQUIREMENTS	PERFORMANCE MEETS ONLY MINIMUM JOB REQUIREMENTS	QUANTITY AND QUALITY OF WORK ARE VERY SATISFACTORY	PRODUCES VERY HIGH QUANTITY AND QUALITY OF WORK. MEETS ALL SUSPENSES. X	QUALITY AND QUANTITY OF WORK ARE CLEARLY SUPERIOR AND TIMELY
3. EFFECTIVENESS IN WORKING WITH OTHERS		INEFFECTIVE IN WORKING WITH OTHERS. DOES NOT COOPERATE	SOMETIMES HAS DIFFICULTY IN GETTING ALONG WITH OTHERS.	GETS ALONG WELL WITH PEOPLE UNDER NORMAL CIRCUMSTANCES	WORKS IN HARMONY WITH OTHERS. A VERY GOOD TEAM WORKER	EXTREMELY SUCCESSFUL IN WORKING WITH OTHERS. ACTIVELY PROMOTES HARMONY X
4. LEADERSHIP CHARACTERISTICS		OFTEN WEAK. FAILS TO SHOW INITIATIVE AND ACCEPT RESPONSIBILITY	INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY ADEQUATE IN MOST SITUATIONS	SATISFACTORILY DEMONSTRATES INITIATIVE AND ACCEPTS RESPONSIBILITY	DEMONSTRATES A HIGH DEGREE OF INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY X	ALWAYS DEMONSTRATES OUTSTANDING INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY
5. JUDGEMENT		DECISIONS AND RECOMMENDATIONS OFTEN UNSOUND OR INEFFECTIVE	JUDGEMENT IS USUALLY SOUND BUT MAKES OCCASIONAL ERRORS	USUALLY GOOD JUDGEMENT RESULTING FROM THOROUGH EVALUATION OF FACTORS	SOUND, LOGICAL THINKER. CONSIDERS ALL FACTORS TO REACH ACCURATE DECISIONS X	UNFAILINGLY ARRIVES AT RIGHT DECISION EVEN IN HIGHLY COMPLEX MATTERS
6. ADAPTABILITY		UNABLE TO PERFORM ADEQUATELY IN OTHER THAN ROUTINE SITUATIONS	PERFORMANCE DECLINES UNDER STRESS OR IN OTHER THAN ROUTINE SITUATIONS	PERFORMS WELL UNDER STRESS OR IN UNUSUAL SITUATIONS	PERFORMANCE EXCELLENT EVEN UNDER PRESSURE OR IN DIFFICULT SITUATIONS X	OUTSTANDING PERFORMANCE WHEN FACING THE CHALLENGE OF DIFFICULT SITUATIONS
7. USE OF RESOURCES		INEFFECTIVE IN CONSERVATION OF RESOURCES (M / P)	USES RESOURCES IN A BARELY SATISFACTORY MANNER (MATERIAL / PERSONNEL)	CONSERVES BY USING ROUTINE PROCEDURES (MATERIAL / PERSONNEL)	EFFECTIVELY ACCOMPLISHES SAVINGS BY DEVELOPING IMPROVED PROCEDURES (MATERIAL X / PERSONNEL X)	EXCEPTIONALLY EFFECTIVE IN USING RESOURCES (MATERIAL / PERSONNEL)
8. WRITING ABILITY AND ORAL EXPRESSION		UNABLE TO EXPRESS THOUGHTS CLEARLY ON ROUTINE MATTERS (W / S)	EXPRESSES THOUGHTS SATISFACTORILY ON ROUTINE MATTERS (W / S)	USUALLY INCISIVE AND EXPRESSES THOUGHTS CLEARLY AND CONCISELY (W / S)	CONSISTENTLY ABLE TO EXPRESS IDEAS CLEARLY (W X / S X)	OUTSTANDING ABILITY TO COMMUNICATE IDEAS TO OTHERS (W / S)
9. MILITARY QUALITIES (Consider how this officer meets Air Force standards)		BEARING AND APPEARANCE FALL SOMEWHAT BELOW AIR FORCE STANDARDS	BEARING AND APPEARANCE MEETS AIR FORCE STANDARDS	BEARING AND APPEARANCE MEETS A GOOD IMPRESSION	ESPECIALLY GOOD BEARING AND APPEARANCE. CREATES A VERY FAVORABLE IMPRESSION X	BEARING AND APPEARANCE ARE OUTSTANDING. IS EXEMPLARY FOR OTHERS TO EMULATE

AF [illegible] PREVIOUS EDITION WILL BE USED

EXHIBIT C-1 COMPANY GRADE OFFICER EFFECTIVENESS REPORT

002

V. OVER-ALL EVALUATION (Compare this officer ONLY with officers of the same grade)

UNSATISFACTORY	MARGINAL	BELOW AVERAGE	EFFECTIVE AND COMPETENT			VERY FINE		EXCEPTIONALLY FINE (SPECIFIC JUSTIFICATION REQUIRED FOR THESE SECTIONS) X	OUTSTANDING

VI. PROMOTION POTENTIAL

1. DOES NOT DEMONSTRATE A CAPABILITY FOR PROMOTION AT THIS TIME	2. PERFORMING WELL IN PRESENT GRADE. SHOULD BE CONSIDERED FOR PROMOTION ALONG WITH CONTEMPORARIES
3. DEMONSTRATES CAPABILITIES FOR INCREASED RESPONSIBILITY. CONSIDER FOR ADVANCEMENT AHEAD OF CONTEMPORARIES X	4. OUTSTANDING GROWTH POTENTIAL BASED ON KNOWN TOTALLY PERFORMANCE. PROMOTE WELL AHEAD OF CONTEMPORARIES

VII. COMMENTS

FACTS AND SPECIFIC ACHIEVEMENTS: Capt Glines has made significant contributions of his time and talent to the Air Force Reserve program since joining the 93d MAGp (Assoc) (AFRES). Capt Glines has attended the C-141 navigator training course at Altus AFB, Oklahoma, where he distinguished himself by graduating second in his class. Capt Glines has also received a recommendation for a checkride in the minimum amount of time. He has devoted 45 days of his time to Active Duty during the past three months and has flown several overwater training missions during that period. He has the additional duties of Squadron Communications Security Officer and Plans Officer. In this capacity, he has developed a communications security briefing to be conducted at his monthly unit training assemblies. He has also contributed significantly to the development of his unit's operations plans. Because of his potential, Capt Glines has been selected to attend the C-5 navigator training course at Altus AFB, Oklahoma. His participation in the Air Force Reserve has been excellent and he has accumulated the maximum allowable number of additional flying training periods. STRENGTHS: Capt Glines is an energetic, zealous officer and has a cooperative attitude. He is easy to get along with and gets along well with others. He has excellent potential and is a dedicated officer. SUGGESTED ASSIGNMENTS: Capt Glines should be upgraded to line navigator as soon as possible and is recommended for attendance at the C-5 navigator training school. OTHER COMMENTS: Capt Glines is athletically inclined and in this regard, enjoys coaching a softball team. His civilian occupation is that of automobile salesman.

VIII. REPORTING OFFICIAL

NAME, GRADE, SSAN, AND ORGANIZATION	DUTY TITLE		SIGNATURE
FRANK L. JACKSON, Major, USAFR 445-32-8157 FV812 MASq (Assoc) Travis AFB, CA (AFRES)	Squadron Navigator		Frank L Jackson
	DEMO RATING: Senior Nav	CODE: 1	DATE: 3 April 1973

IX. REVIEW BY INDORSING OFFICIAL

I concur with the comments and ratings of the reporting official. Capt Glines is energetic and possesses a strong desire to do an exceptional job for the Reserve program. Due to his rapid progression and fine attitude, I have selected him for conversion to the C-5 Associate Reserve squadron.

NAME, GRADE, SSAN, AND ORGANIZATION	DUTY TITLE		SIGNATURE
EDMOND F. COOLEY, JR., Major, USAFR, 508-34-1945 FV301 MASq (Assoc), Travis AFB, CA (AFRES)	Squadron Navigator		Edmond F Cooley Jr
	DEMO RATING: Master Nav	CODE: 1	DATE: 3 April 1973

C-2

21 083

MICROFILMED 02 MAY 73

LAST NAME-FIRST NAME-MIDDLE INITIAL	SSAN	ACTIVE DUTY GRADE
GLINES, ALBERT E.	552-52-9680FV	NONEAD

(CHECK APPROPRIATE BLOCK AND COMPLETE AS APPLICABLE)

☒ SUPPLEMENTAL SHEET TO RATING FORM WHICH COVERS THE FOLLOWING PERIOD OF REPORT	☐ LETTER OF EVALUATION COVERING THE FOLLOWING PERIOD OF OBSERVATION

FROM	THRU	FROM	THRU
1 Jun 72	25 Feb 73		

Precede comments by appropriate data, i.e. section continuation, indorsement continuation, additional indorsement, etc. Follow comments by the authentication to include: name, grade, AFSN, organization, duty title, date and signature.

ADDITIONAL INDORSEMENT

Captain Glines' excellent ability as a C-141 navigator was demonstrated when he attended the C-141 navigator training course and graduating second in his class. I concur with the reporting and indorsing officials.

CHARLES H. MICHAEL, Colonel, USAFR, 568-28-2982FV, 938 Mil Alft Gp (ASSOC)(AFRES), Commander, 6 April 1973

AF FORM 77a JUL 69 PREVIOUS EDITION OF THIS FORM WILL BE USED UNTIL STOCK IS EXHAUSTED. C-3

SUPPLEMENTAL SHEET TO AF FORMS 77, 707, 909, 910, 911 AND 475

MICROFILMED 1 MAY 73 APDS PROCESSED 31 OCT 1973

719

I. IDENTIFICATION DATA

1. LAST NAME-FIRST NAME-MIDDLE INITIAL	2. SSAN	3. ACTIVE DUTY GRADE	4. PERMANENT GRADE
Glines, Albert E.	552-52-9680FV	NONEAD	Captain

5. ORGANIZATION, COMMAND AND LOCATION	6. AERO RATING	CODE	7. PERIOD OF REPORT
301 MASq (Assoc) (AFRES) Travis AFB CA 94535	Sr Nav	1	FROM 26 Feb 73 THRU 29 Jul 73
	8. PERIOD OF SUPERVISION: 154		9. REASON FOR REPORT: CRO

II. PRESENT DUTY

PAFSC 1545L DAFSC 1545L SQUADRON NAVIGATOR C-141.

Navigates aircraft to accomplish cargo airlift and other assigned missions. Plans the navigational phase of each mission and insures that all navigational equipment is inspected and preflighted. Performs minor in-flight maintenance and maintains flight logs and records.

III. RATING FACTORS (Consider how this officer is performing on his job.)

	NOT OBSERVED					
1. KNOWLEDGE OF DUTIES	○	SERIOUS GAPS IN HIS KNOWLEDGE OF FUNDAMENTALS OF HIS JOB	SATISFACTORY KNOWLEDGE OF ROUTINE PHASES OF HIS JOB	WELL INFORMED ON MOST PHASES OF HIS JOB	EXCELLENT KNOWLEDGE OF ALL PHASES OF HIS JOB	X
2. PERFORMANCE OF DUTIES	○	QUALITY OR QUANTITY OF WORK OFTEN FAILS TO MEET JOB REQUIREMENTS	PERFORMANCE MEETS ONLY MINIMUM JOB REQUIREMENTS	QUANTITY AND QUALITY OF WORK ARE VERY SATISFACTORY	PROCEEDS VERY WITH QUALITY AND QUANTITY OF WORK MEETS ALL RESPONSES	X
3. EFFECTIVENESS IN WORKING WITH OTHERS	○	INEFFECTIVE IN WORKING WITH OTHERS DOES NOT COOPERATE	SOMETIMES HAS DIFFICULTY IN GETTING ALONG WITH OTHERS	GETS ALONG WELL WITH PEOPLE UNDER NORMAL CIRCUMSTANCES	WORKS IN HARMONY WITH OTHERS A VERY GOOD TEAM WORKER	X
4. LEADERSHIP CHARACTERISTICS	○	OFTEN HESITATES TO SHOW INITIATIVE AND ACCEPT RESPONSIBILITY	INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY ADEQUATE IN MOST SITUATIONS	SATISFACTORILY DEMONSTRATES INITIATIVE AND ACCEPTS RESPONSIBILITY	DEMONSTRATES A HIGH DEGREE OF INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY	X
5. JUDGEMENT	○	DECISIONS AND RECOMMENDATIONS OFTEN WRONG OR INEFFECTIVE	JUDGEMENT IS USUALLY SOUND BUT MARED OCCASIONAL LAPSES	SHOWS GOOD JUDGEMENT IN SELECTING FACTORS FOR EVALUATION OF FACTORS	SOUND LOGICAL THINKER CONSIDERS ALL FACTORS TO REACH ACCURATE DECISIONS	X
6. ADAPTABILITY	○	UNABLE TO PERFORM EFFECTIVELY IN OTHER THAN ROUTINE SITUATIONS	PERFORMANCE DECLINES SOMEWHAT UNDER STRESS OR IN OTHER THAN ROUTINE SITUATIONS	PERFORMS WELL UNDER STRESS OR IN UNUSUAL SITUATIONS	PERFORMANCE EXCELLENT EVEN WHEN FACED WITH DIFFICULT SITUATIONS	X
7. USE OF RESOURCES	○	INEFFECTIVE IN CONSERVATION OF RESOURCES	USES RESOURCES IN A MANNER SATISFACTORY UNDER	CONSERVES BY USING ROUTINE PROCEDURES	EFFECTIVELY ACCOMPLISHES GOALS BY DEVELOPING IMPROVED PROCEDURES	EXCEPTIONALLY EFFECTIVE IN USING RESOURCES
8. WRITING ABILITY AND ORAL EXPRESSION	○	UNABLE TO EXPRESS THOUGHTS CLEARLY IDEAS DISORGANIZED	EXPRESSES THOUGHTS FAIRLY ON ROUTINE MATTERS	USUALLY EXPRESSES IDEAS CLEARLY AND CONCISELY	NOTICEABLY ABLE TO EXPRESS IDEAS CLEARLY	X
IV. MILITARY QUALITIES (Consider how this officer meets Air Force standards.)						
	○	BEARING OR BEHAVIOR INTERFERE SERIOUSLY WITH HIS EFFECTIVENESS	LOWERS HIS EFFECTIVENESS	BEARING OR BEHAVIOR CREATES A GOOD IMPRESSION	BEARING AND BEHAVIOR CREATES A VERY FAVORABLE IMPRESSION	X

AF FORM 77 PREVIOUS EDITION WILL BE USED

COMPANY GRADE OFFICER EFFECTIVENESS REPORT

EXHIBIT D-1

V. OVER-ALL EV... (Compare this officer ONLY with officers in same grade)

UNSATISFACTORY	MARGINAL	BELOW AVERAGE	EFFECTIVE AND COMPETENT	VERY FINE	EXCEPTIONALLY FINE	OUTSTANDING
					X	

VI. PROMOTION POTENTIAL

1. DOES NOT DEMONSTRATE A CAPABILITY FOR PROMOTION AT THIS TIME.
2. PERFORMING WELL IN PRESENT GRADE. SHOULD BE CONSIDERED FOR PROMOTION ALONG WITH CONTEMPORARIES
3. DEMONSTRATES CAPABILITIES FOR INCREASED RESPONSIBILITY. CONSIDER FOR ADVANCEMENT AHEAD OF CONTEMPORARIES — X
4. OUTSTANDING GROWTH POTENTIAL BASED ON DEMONSTRATED PERFORMANCE. PROMOTE WELL AHEAD OF CONTEMPORARIES

VII. COMMENTS

FACTS AND SPECIFIC ACHIEVEMENTS: Capt Glines has performed his duties in an exceptionally fine manner throughout the period of this report. His participation and performance in all scheduled unit training assemblies have been especially noteworthy. His effective use of materiel and personnel while serving as Manuals Control Officer demonstrated his great efficiency and success while working with others. Capt Glines has proven to be a competent and professional navigator. The examiner on his recent C-141 initial evaluation had many favorable comments on his performance. In order to broaden his technical knowledge, he also accumulated the maximum number of additional flying training periods. Because of his proven abilities, he has been selected to transition to the highly sophisticated C-5A aircraft and entered training on 30 July 1973. He has expressed a high degree of enthusiasm for this assignment and will undoubtedly be an asset to the 301 MASq.
STRENGTHS: Capt Glines is a conscientious officer who will see a project through to its completion. He has excellent potential and gets along well with others.
SUGGESTED ASSIGNMENTS: In order to best utilize his talents, Capt Glines should be upgraded to navigator immediately upon his return from formal C-5A school.
OTHER COMMENTS: Capt Glines' devoted interest and outstanding abilities in the field of athletics have aided greatly in the high success of the local softball program where he volunteers his services as a coach and manager. His civilian employment is that of an automobile salesman. Capt Glines promotes the Equal Opportunity Program.

VIII. REPORTING OFFICIAL

NAME, GRADE, SSAN AND ORGANIZATION	DUTY TITLE	SIGNATURE
CHARLES EGIZIANO, Capt, USAFR 127-30-6610FV, 301 MASq (Assoc) Travis AFB, CA (AFRES)	Squadron Navigator	Charles Egiziano
	SENIOR RATING: Senior Nav	CODE: 1
		DATE: 20 August 1973

IX. REVIEW BY INDORSING OFFICIAL

I concur with the above report. Capt Glines is an officer whose full potential has not yet been realized. He should be an asset to the 301 MASq.

NAME, GRADE, SSAN AND ORGANIZATION	DUTY TITLE	SIGNATURE
JOEL V. FALK, Capt, USAFR 503-34-5303FV, 301 MASq (Assoc) Travis AFB, CA (AFRES)	Squadron Navigator	Joel V. Falk
	SENIOR RATING: Navigator	CODE: 1
		DATE: 20 August 1973

D-2

LAST NAME-FIRST NAME-MIDDLE INITIAL	SSAN	ACTIVE DUTY GRADE
Glines, Albert E.	552-52-9680FV	NONEAD

(CHECK APPROPRIATE BLOCK AND COMPLETE AS APPLICABLE)

[X] SUPPLEMENTAL SHEET TO RATING FORM WHICH COVERS THE FOLLOWING PERIOD OF REPORT	[ ] LETTER OF EVALUATION COVERING THE FOLLOWING PERIOD OF OBSERVATION
FROM: 26 Feb 73 — THRU: 29 Jul 73	FROM: — THRU: —

Precede comments by appropriate data, i.e. section continuation, indorsement continuation, additional indorsement, etc. Follow comments by the authentication to include: name, grade, AFSN, organization, duty title, date and signature.

ADDITIONAL INDORSEMENT: I concur. Capt Glines in addition to flying has made himself available for additional duties during the unit training assemblies. I personally assigned him several projects in the Navigator Section and he completed them professionally and with dispatch. Recommend Capt Glines enroll in Air Command and Staff College by correspondence in order to better utilize his administrative and managerial abilities.

Edmond F. Cooney Jr

EDMOND F. COONEY, JR., Major, USAFR, 508-34-1945FV, 301 MASq (Assoc), Squadron Navigator, 20 August 1973

ADDITIONAL INDORSEMENT: Capt Glines has demonstrated his dedication and ability through a high level of participation. I concur with this evaluation and the recommendations of his reporting and indorsing officials to upgrade as C-5 navigator and increase his professional skills through correspondence courses.

B. C. MEANS, Colonel, USAFR, 551-12-5762FV 349 Mil Aft Wg (Assoc), (AFRES), Commander, 28 August 1973

AF FORM 77a JUL 69 PREVIOUS EDITION OF THIS FORM WILL BE USED UNTIL STOCK IS EXHAUSTED.

SUPPLEMENTAL SHEET TO AF FORM 707, 909, 910, 911 AND 475

D-3

AFFIDAVIT OF ERIC A. SEITZ

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

ERIC A. SEITZ, being first duly sworn on oath, deposes and says:

1. I am an attorney admitted to practice before the Supreme Court of the United States, before state courts in California and Hawaii, and before numerous federal courts for trial and appellate proceedings.

2. Currently I am engaged in the private practice of law with offices located at 681 South King Street, Suite 200, Honolulu, Hawaii 96813.

3. Commencing in September, 1972, I represented an individual named PATRICK CHENOWETH in connection with his trial before a Navy court-martial on charges alleging, in substance, acts of sabotage to the aircraft carrier U.S.S. Ranger.

4. The court-martial proceedings in Mr. CHENOWETH's case occurred over a period of several months at the United States Naval Base, Treasure Island, California, terminating on or about June 5, 1973, by findings of the military court that he was not guilty of the specifications and charges on which he was tried.

5. During the entire period of time, from his arrest in July, 1972, until his acquittal in early June, 1973, Mr. CHENOWETH was confined without bail at the correctional facility on Treasure Island. A petition for habeas corpus was filed in his behalf and ultimately

reached the Supreme Court upon a petition for certiorari, resulting in the Order that is appended hereto as Exhibit A.

/s/ E.A. Seitz
ERIC A. SEITZ

Subscribed and sworn to
before me this 3rd day
of July, 1979.

/s/ Marilyn Joy Barbain
Notary Public, First
Judicial Circuit, State of Hawaii

My commission expires: 5/1/83

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543
October 9, 1973

Eric A. Seitz, Esq.
405 Capp Street
San Francisco, Calif. 94110

RE: CHENOWETH v. WARNER, SEC'Y of NAVY, et al., 72-6812

Dear Sir:

The Court today entered the following order in the above-entitled case:

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Northern District of California with directions to dismiss the case as moot.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By
/s/ HELEN TAYLOR
Helen Taylor, (Mrs.)
Assistant Clerk

AIRMAIL

RECEIVED OCT 30 1973

FOR ARGUMENT

Supreme Court, U.S.
FILED
OCT 31 1979
MICHAEL RODAK, JR., CLERK

No. 78-1006

In the Supreme Court of the United States

OCTOBER TERM, 1979

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

ALBERT EDWARD GLINES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

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HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL., PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

1. We argued in our opening brief that 10 U.S.C. 1034 applies only to the individual communications of servicemen with Members of Congress and not to the public circulation of group petitions. We noted that the statute was enacted in response to an incident in which an individual sailor had been threatened with a court martial if he sent a letter to his Congressman without transmitting it through the military chain of command. 97 Cong. Rec. 3776 (1951). The Navy informed Congress at that time that, under Articles 1248 and 1249 of its regulations, "any letter from a member of the naval service, to Congress or to a Congressman which affects the Naval Establishment, should be sent through official channels."[1] *Ibid.* Congress enacted 10 U.S.C. 1034 with the express and limited

[1]By contrast, the Air Force informed Congress that any airman's "personal correspondence remains a matter entirely of his own choice." 97 Cong. Rec. 3777 (1951).

objective in mind of permitting "any man who is inducted to sit down and take a pencil and paper and write to his Congressman or Senator." 97 Cong. Rec. 3776 (1951) (Rep. Vinson). Accord, *id.* at 3877. Throughout the legislative history, the focus of the congressional concern was on removing restrictions on individual communications with Members of Congress; group activity and petitions were not considered or discussed even indirectly in the legislative debates.

Despite the complete absence of any reference in the legislative history or in the statute[2] to collective or group petitioning activity, respondent argues that 10 U.S.C. 1034 applies to group petitions as well as to individual communications with Members of Congress. In support of this contention, respondent notes that approximately a month after 10 U.S.C. 1034 was enacted,[3] Representative Javits inserted into the Congressional Record a copy of what was then Article 1248 of the Navy Regulations. The text of Article 1248 showed that headquarters clearance was then required by the Navy not only for individual "communications [to a member of Congress] from any person or persons in the naval service" but also for "petitions, remonstrances [and] memorials." 97 Cong. Rec. A4977 (1951). Respondent apparently reasons (Resp. Br. 9) that, because Navy regulations in 1951 required

[2]10 U.S.C. 1034 does not mention petitioning or collective activity. It applies only to a "communication" between a "member of an armed force * * * [and] a Member of Congress." *Ibid.* By contrast, 5 U.S.C. 7102 provides that "[t]he right of [Civil Service] employees, individually or collectively, to petition Congress or a member of Congress * * * may not be interfered with or denied."

[3]10 U.S.C. 1034 was enacted on June 19, 1951. Section 1(d) of Pub. L. No. 51, 65 Stat. 78. Representative Javits placed a copy of Article 1248 in the Congressional Record as part of the extension of his remarks of July 25, 1951. 97 Cong. Rec. A4977 (1951).

headquarters clearance for "petitions" as well as "communications," when Congress referred only to "communications" in 10 U.S.C. 1034 it must have intended to refer to both.

But Representative Javits did not state or imply in his remarks following enactment of the statute that Section 1034 encompasses both group petitions and individual communications with Congressmen. See 97 Cong. Rec. A4977 (1951). Even if he had, of course, such a post-enactment statement "by a single member of Congress [would] carry little if any weight." *Quern* v. *Mandley*, 436 U.S. 725, 736 n.10 (1978). See *Chandler* v. *Roudebush*, 425 U.S. 840, 860 n.36 (1976); *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U.S. 612, 639 n.34 (1967). What is significant in understanding the legislative intent is the evil the statute was designed to remedy and the situation "as it was pressed upon the attention of the legislative body." *Holy Trinity Church* v. *United States*, 143 U.S. 457, 463 (1892). See *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *Platt* v. *Union Pacific R.R.*, 99 U.S. 48, 64 (1878). As we demonstrated in our opening brief (Br. 37-42), Congress was concerned with—and the language of the statute is focused solely upon (see note 2, *supra*)— individual communications of servicemen with Members of Congress.[4] The statute was not meant to embrace group petitioning activity, and the text reflects its limited concern with individual communications.

[4]At the time Congress enacted this statute, it was concerned only with the portion of the Navy regulation that required "any letter from a member of the naval service, to Congress or to a Congressman which affects the Naval Establishment, [to] be sent through official channels." 97 Cong. Rec. 3776 (1951). This was the only feature of the regulation that Congress had before it when Section 1034 was enacted. See *ibid.*

Moreover, *if* Congress had been aware (which it plainly was not, see note 4, *supra*) that then-existing Navy regulations required both individual "communications" and group "petitions" to be sent through official channels, this would not support respondent's contention that the statute applies to both. If any inference could be drawn from the fact that Navy regulations in 1951 described "petitions" and "communications" separately while the statute refers only to "communications," the inference would be that Congress did not legislate with respect to group "petitions." See also note 2, *supra*.[5] The question is entirely hypothetical, however, because, at the time the legislation was enacted, Congress had been informed only that the Navy regulations required "any letter from a member of the naval service, to Congress * * *, [to] be sent through official channels." 97 Cong. Rec. 3776 (1951). See note 4, *supra*. As we have shown, it was the concern for freeing such individual communications from official channels that was the exclusive focus of the legislation.

2. Respondent argues (Resp. Br. 22-29) that, if 10 U.S.C. 1034 bars application of the challenged regulation to the distribution of petitions to Members of Congress, there is no need for the Court to consider in this case whether the Constitution bars application of the regulation to the distribution of petitions to other government officers. We disagree.

[5]See Terrell, *Petitioning Activities on Military Bases: The First Amendment Battle Rages Again*, 28 Emory L.J. 3, 31-35 (1979). See also *id.* at 33: "It is apparent that [the legislative] discussions reflected a belief that the only form of communication covered by the statute was individual letters by servicemembers, not efforts to gain a mass of signatures on a protest document."

a. 10 U.S.C. 1034 applies only to communications "with a member of Congress," and one of respondent's petitions was addressed to the Secretary of Defense. Respondent argues that "[i]t would be unjust if not absurd" (Resp. Br. 29) for the statute to apply only to petitions to Members of Congress and not to petitions addressed to other government officers. Respondent therefore proposes that the term "Member of Congress" in 10 U.S.C. 1034 be "construed broadly" (Resp. Br. 29) to include the Secretary of Defense.

Construing the term "Member of Congress" in 10 U.S.C. 1034 to include the Secretary of Defense would not merely "fracture the clear language of [the] statute,"[6] it would ignore it. " 'The starting point in every case involving construction of a statute is the language itself.' " *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976), quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). When, as here, Congress has spoken "in the plainest of words," *TVA* v. *Hill*, 437 U.S. 153, 194 (1978), the Court may not "pre-empt congressional action" and disregard the limited "course consciously selected by the Congress * * *." *Id.* at 194, 195. The Secretary of Defense is not a Member of Congress, and the petition addressed to him is plainly outside the scope of 10 U.S.C. 1034.

b. Respondent claims (Resp. Br. 22-26) that, if the petitions he addressed to Members of Congress are protected by 10 U.S.C. 1034, his transfer to the inactive reserve should be reversed for this reason alone. Respondent argues that this case therefore fails to raise the question whether the Constitution bars application of the regulation to petitions addressed to persons other than Members of Congress.

[6]*Andrus* v. *Sierra Club*, No. 78-625 (June 11, 1979), slip. op. 8.

But the district court did not merely reverse respondent's transfer and order him reinstated to active duty. The court also declared the challenged military regulations, as applied to petitions addressed to any government officer, "to be null, void and inoperative, as being in conflict with the First Amendment to the Constitution * * *" (A. 37). This declaratory judgment was affirmed by the court of appeals (Pet. App. 9a, 14a, 16a). Because respondent must be returned to active duty under the judgment of the courts below (A. 37), there is a continuing controversy between respondent and petitioners concerning the constitutionality of the challenged regulations.

3. In *Greer* v. *Spock*, 424 U.S. 828 (1976), this Court upheld the constitutionality of an Army regulation that required the "prior written approval" of the base commander before any person could distribute any publication on base. *Id.* at 831. The Court noted that a military base is not a public forum (*id.* at 831) and concluded that (*id.* at 840):

> There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.

Respondent attempts to distinguish *Greer* v. *Spock* from the present case on the theory that the two cases involve "entirely different" speech interests and governmental policies (Resp. Br. 30).

But, as we noted in our opening brief (Br. 17), the regulations at issue in this case are identical in purpose and effect to the regulation upheld in *Greer* v. *Spock*. Both in this case and in *Greer* v. *Spock*, the only materials that a military commander "may disapprove [for on base distribution] are those that he finds constitute 'a clear

danger to [military] loyalty, discipline, or morale' * * *." 424 U.S. at 840. See AFR 35-15(3)(a)(2). The governmental interest involved here is thus in no way different from that involved in *Greer* v. *Spock*.

Nor is the challenged regulation more severe in its effect on free speech interests than was the regulation upheld in *Greer* v. *Spock*, as respondent contends (Resp. Br. 31-32). As we have shown in our opening brief (*e.g.*, Br. 19-20), the regulation preserves a broad range of opportunities for servicemen to engage in political discussion and political action while protecting the government's substantial interest in averting conduct that presents a "clear danger to the loyalty, discipline, or morale" of troops serving the nation's defense. The record in this case demonstrates that servicemen (i) may distribute petitions off base wholly without command approval;[7] (ii) may distribute petitions on base with command approval when the distribution does not clearly endanger military loyalty, discipline and morale;[8] (iii) may communicate individually

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[7]Pursuant to agreements with nations where United States bases are located, the off base-distribution of petitions and other forms of political activity are prohibited at foreign duty stations. See Br. 20 n.8; *Culver* v. *Secretary of the Air Force*, 559 F. 2d 622, 628 (D.C. Cir. 1977). This restriction was upheld in *Secretary of the Navy* v. *Huff* (78-599 Pet. App. 48a-50a), and is not challenged by respondent.

[8]Respondent apparently contends that the substantive regulatory criteria afford no protection to servicemen because "[e]ach time a request has been made to circulate a petition on base, the request has been denied" (Resp. Br. 57; see *id.* at 21). This statement is simply in error. Permission to distribute petitions is often granted, because distribution is prohibited only if it presents a clear danger to military discipline, loyalty or morale. To be sure, it is only when distribution is prohibited that litigation occurs, and it is this obvious fact that explains why "[i]n each of the *reported* cases where permission was sought to circulate petitions on military bases, such permission was

with any Member of Congress or other government officers; and (iv) may engage in oral discussions of political topics or other issues either off base or on base (see Br. 19-20 and n.7).

There is thus no basis for distinguishing this case from *Greer* v. *Spock*, and the constitutionality of the regulation should be upheld for this reason alone.

b. Respondent argues that the regulatory prior approval requirement is unconstitutional because the government has not shown that prior approval is necessary to protect the government's valid interest in "loyalty, discipline and morale in all but exceptional circumstances" (Resp. Br. 50). But respondent has mischaracterized the burden that the government bears in defense of the challenged regulation.

First, as we have shown in our opening brief (Br. 28-30), a military base is not a public forum. The government may prohibit speech and conduct, including petitioning activities, that interfere with the substantial purposes of military facilities. *Greer* v. *Spock*, *supra*, 424 U.S. at 838, 840; See *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974); *Police Department* v. *Mosley*, 408 U.S. 92, 100-102 (1972). The regulatory prohibition against the on base distribution of petitions that clearly endanger military loyalty, discipline and morale is based on clear standards that limit the use of military facilities to the purpose for which the facilities were created; the prior approval requirement, which implements the substantive prohibi-

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denied" (Resp. Br. 21; emphasis supplied). We note, however, that permission to distribute petitions on base was granted by the base commander in at least one instance detailed in the record of *Secretary of the Navy* v. *Huff* (78-599 Pet. App. 40a). In this case, respondent never sought permission to circulate his petition; he was aware of the regulatory prior approval requirement and acted in conscious defiance of it (Pet. App. 2a-4a).

tion, is therefore constitutional (Br. 29). See *Greer* v. *Spock*, *supra*, 424 U.S. at 840; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975).

Second, even if military bases could be regarded as public forums, the challenged regulations constitute essentially time, place and manner restrictions, rather than prior restraints on speech.[9] As we discussed above (pages 7-8, *supra*) and in our opening brief (Br. 19-20), a serviceman is free to discuss and communicate political ideas both on and off military base. The regulation requires only that such discussion and communication be conducted in a manner and in a place that does not create a clear danger to fundamental military objectives. This regulatory objective is plainly constitutional. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-112 (1972).

Finally, respondent is wrong in contending that, under this Court's decisions, a prior approval requirement can be valid *only* if the threatened injury to military discipline, loyalty and morale exists in "all but exceptional circumstances." The Court has never imposed such a standard, either for the screening of materials prior to permitting their distribution on a military base (*Greer* v. *Spock*, *supra*, 424 U.S. at 840) or for the screening of motion pictures prior to licensing them for distribution in a city's theatres (*Times Film Corp.* v. *Chicago*, 365 U.S. 43, 49-50 (1961)). Instead, the Court has held that a system of prior approval is permissible where a less restrictive regulatory scheme would not be adequate to

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[9]The regulation is not invalid under the First Amendment merely because it looks to the content of the petition, among other considerations, in determining whether distribution would clearly endanger military loyalty, discipline or morale. See *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 742-750 (1978); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976) (plurality opinion).

avert or "mitigate the effects" of an improper distribution. *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 562 (1976). As we have shown in our opening brief (Br. 33-35), there are no adequate less restrictive alternatives to safeguard the fundamental military interests that underlie the regulations challenged in this case.

For the reasons stated here and in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979

DOJ-1979-10

see

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